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No.

IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Supreme Court correctly held, in conflict with the principles of this Court and decisions of several lower courts, that the Fourth Amendment to the United States Constitution prohibits random, suspicionless drug testing of firefighters absent evidence of prior drug abuse within the fire department?

PARTIES TO THE PROCEEDING

The parties to the proceedings before this Court are the City of Mesa, Arizona and Craig W. Petersen.

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On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner City of Mesa respectfully petitions for a Writ of Certiorari to review the judgment of the Arizona Supreme Court in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the Arizona Supreme Court is reported at 207 Ariz. 35, 83 P.3d 35 (2004), and is reprinted at Appendix (App.) 1a-17a. The opinion of the Arizona Court of Appeals is reported at 204 Ariz. 278, 63 P.3d 309 (App. 2003) and is reprinted at App. 18a-43a. The trial court's unreported decision is reprinted at App. 44a-54a.

JURISDICTION

The opinion of the Arizona Supreme Court was issued on January 27, 2004. On April 8, 2004, Associate Justice O'Connor extended the time to file this petition until May 26, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

STATEMENT OF THE CASE

This case raises an important, recurring question relating to a municipality's authority to randomly drug test employees holding safety-sensitive positions. Specifically, must a municipality wait until it can document a history of drug abuse or a history of drug-related accidents within its fire department before it can randomly drug test firefighters without violating the Fourth Amendment?

Mesa's Fire Department Substance Abuse Program requires employees in safety-sensitive positions to undergo random, suspicionless drug and alcohol testing.[1] It was implemented "to deter prohibited alcohol and controlled substance use and to detect prohibited use for the purpose of removing identified users from the safety-sensitive work force."[2] Mesa's policy designates firefighters, most of whom are licensed paramedics, as safety-sensitive professionals because they administer invasive medical treatment, drive emergency vehicles, and are called upon to perform dangerous rescues.

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[1] The City's policy also requires testing upon reasonable suspicion, post accident, and following an employee's return to duty. These portions of the policy were not challenged or discussed by the lower courts and, therefore, will not be discussed in this petition.

[2] Mesa Fire Department Substance Abuse Program Alcohol and Controlled Substance Testing Policy and Procedures, Oct. 2000. (Attached as Exhibit 1 to Mesa's Motion to Dismiss, filed August 24, 2001.)

Under the policy, a computer program randomly selects firefighters for drug testing. Firefighters are notified immediately before, during, or after work and, with allowance for travel time to the laboratory, are to be tested within thirty minutes of notification. They are permitted to use private bathroom stalls to provide urine samples, which are then inspected for proper color and temperature. The lab performs an immunoassay test that meets the requirements of the Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Program.[3] Samples are tested for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine. All positive tests are confirmed with a gas chromatography/mass spectrometry test. Positive test results are provided to a Medical Review Officer, who has detailed knowledge of possible alternate medical explanations, and who reviews the results and confidentially consults with the employee before giving the results to the department's administrative official. All information, including positive tests, remains confidential and is not disclosed by the department without the firefighter's consent.

The respondent, a City of Mesa firefighter, challenged the City's random drug testing policy alleging that it violated his rights under Article II, Section 8 of the Arizona Constitution and the Fourth Amendment to the United States Constitution.

The trial court, utilizing the special needs balancing test established in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), found that the policy violated the Arizona Constitution. The court permanently enjoined Mesa from implementing the policy.[4]

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[3] 49 C.F.R. 40 (2003).

[4] The trial court did not discuss whether the policy was permissible under the U.S. Constitution. (App. 44a-54a.)

Reversing the trial court, the court of appeals found that the City's interest in protecting the public from firefighters who may be under the influence of drugs or alcohol outweighs the firefighters' individual privacy rights. In evaluating the government interest, the court stated:

> Firefighters must be mentally alert at all times in order to instantly respond to a crisis and grasp and follow orders, particularly when a split-second decision or error in judgment may prove fatal; they also must be physically fit in order to perform under the extremely demanding and dangerous conditions that jeopardize their own lives, the lives of their co-workers, and the lives and property of the public . . . . Given the daunting responsibilities they must shoulder on a moment's notice, firefighters expect, and necessarily accede to, more governmental regulation than most workers. Because the trust placed in them is so great, the need to detect a firefighter who is impaired at work is equally great.

(App. 30a-31a.) Balancing the interests, the court stated: "[I]f firefighters must be ever-vigilant, we think the City can be no less vigilant in detecting impaired firefighters and removing them from the workforce." (App. 33a.) The court held that the policy was reasonable under both the Arizona Constitution and the U.S. Constitution.

The Arizona Supreme Court, applying the special needs test, found:

- Firefighters hold safety-sensitive positions. (App. 7a.)
- The City has an interest in deterring and detecting drug and alcohol use by firefighters. (App. 7a.)
- The U.S. Supreme Court has not "required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." (App. 8a-9a.)
- Firefighters have a diminished expectation of privacy. (App. 12a.)

- The City's program has procedures in place that "work to reduce the intrusiveness of the privacy invasion." (App. 13a.)

Despite these findings, the Arizona Supreme Court reversed the court of appeals and found that the policy violated the Fourth Amendment of the United States Constitution.[5] The Court premised its decision on two factors: (1) the lack of evidence of drug use at the Mesa Fire Department; and, (2) the random, unannounced nature of the searches. The Court concluded that because there is no evidence of drug use at the Mesa Fire Department, there is not a "real" or "substantial" threat to public safety. (App. 11a.) The Court held that even the firefighters' "diminished expectation of privacy" outweighs the City's interest in public safety. (App. 16a.)

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court struck down a policy implemented to protect the public from the dangers associated with firefighters who are impaired on the job. Other circuits and states have upheld random drug testing of truck drivers,[6] horse racing jockeys,[7] airport maintenance workers,[8] and flight attendants[9] in order to ensure public safety in these purportedly safety-sensitive positions. According to the Arizona Supreme Court, however, Arizona municipalities

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[5] The Arizona Supreme Court did not discuss whether the policy was permissible under the Arizona Constitution.

[6] *See, e.g., Int'l Bhd. of Teamsters v. Dep't of Trans.*, 932 F.2d 1292, 1300 (9th Cir. 1991).

[7] *See, e.g., Dimeo v. Griffin*, 943 F.2d 679, 683-85 (7th Cir. 1991); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986).

[8] *See Boesche v. Raleigh-Durham Airport Auth.*, 432 S.E.2d 137, 140 (N.C. Ct. App. 1993).

[9] *See Bluestein v. Skinner*, 908 F.2d 451, 454-57 (9th Cir. 1990).

without a history of drug abuse in the fire department are not permitted to randomly test their firefighters.

This petition should be accepted for three reasons: the decision (1) conflicts with the principles established by this Court and with decisions of other circuits; (2) conflicts with federal statutes and regulations that require random testing of safety-sensitive positions; and, (3) will have a substantial adverse impact on municipalities' ability to serve their communities in essential, safety-sensitive services.

I. THE ARIZONA SUPREME COURT'S DECISION IMPOSES A NEW CONSTITUTIONAL STANDARD FOR RANDOM DRUG TESTING OF SAFETY-SENSITIVE EMPLOYEES THAT CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT AND THE DECISIONS OF NUMEROUS CIRCUIT COURTS.

The Arizona Supreme Court's decision imposes on Arizona governmental entities a unique constitutional standard that has not been imposed upon other employers of safety-sensitive workers. Review by this Court is needed to restore a consistent constitutional standard among the states and federal circuits.

A. The Decision Creates a New Standard for Determining the Governmental Interest Involved.

The special needs balancing test requires a balancing of the government's legitimate interest to test against the intrusion on the individual's privacy interest. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995). Mesa's interest must be "important enough" to justify testing of its firefighters, but need not be a "compelling" interest. *Id.* at 661. The Arizona Supreme Court found that without historical evidence of drug use within the testing group, the govern-

ment's interest is so insubstantial it cannot be sufficient enough to permit random drug testing. (App. 8a-11a.)

This Court, however, has not required documented evidence of a drug problem to demonstrate a sufficient government interest to test. To the contrary, it upheld a suspicionless drug testing policy for Customs Service employees, even though the policy was not in response to a history of drug problems. *National Treasury Employees Union v. Von Raab*, 489 U.S 656, 673-75 (1989). In following *Von Raab*, the Federal Circuit upheld random, suspicionless drug testing of firefighters, without any discussion about prior drug use within the department. *Hatley v. Department of the Navy*, 164 F.3d 602, 605 (Fed. Cir. 1998) ("the government's compelling interest in keeping its firefighters free of drugs outweighs the expectation of privacy of these employees").

Since *Von Raab*, several federal agencies instituted random drug testing policies for safety-sensitive employees. These policies were implemented pursuant to Executive Order 12,564. The stated goal of this Order was to create a "drug-free Federal workplace."[10] The policies were not implemented because of drug abuse in the individual agencies. The policies were challenged and upheld. *See, e.g., Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990) (upholding random testing of executive office employees with "secret" national security clearances without discussing evidence of drug abuse by these employees); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 971 (D.C. Cir. 1990) (upholding random testing of shuttle bus drivers without discussing evidence of drug abuse).

The Arizona Supreme Court's insistence on empirical evidence of prior drug abuse also clashes with the views of the Ninth Circuit. The Ninth Circuit upheld random drug testing

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[10] 51 Fed. Reg. 32,889 (Sept. 17, 1986).

of truck drivers even though "data documenting actual drug use by commercial drivers and its role in highway accidents were scarce." *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292, 1295 (9th Cir. 1991). There was scarce data, in *Brotherhood of Teamsters,* even though the drug testing would affect three million truck drivers. *Id.* Here, there is a relatively small group subject to testing (Mesa employs 372 firefighters). Within a small department or agency, it becomes statistically less likely to discover a drug problem until there is a significant problem or catastrophe.[11]

But even if there were no evidence of drug abuse by truckers, the Ninth Circuit would have allowed random drug testing: "Even assuming no evidence of substantial drug abuse among truck drivers existed, the FHWA's interest in deterring drug abuse and in 'preventing an otherwise pervasive societal problem from spreading' to the trucking industry would 'furnish an ample justification' for the testing program." *Id.* at 1305, quoting *Von Raab*, 489 U.S. at 674-75.

To justify its departure from this precedent, the Arizona Supreme Court distinguished *Von Raab*'s Customs Service employees from firefighters in part on the ground that firefighters are not directly involved in the interdiction of illegal drugs, do not carry firearms, and are not "required to use deadly force in the regular course of their duties." (App. 10a.) But circuit courts around the country have not required such evidence to find a sufficient governmental interest to test, and have upheld testing for employees much more removed from public safety positions than firefighters. *See, e.g., Brotherhood of Teamsters*, 932 F.2d at 1305 (truck

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[11] In other words, if there is a hypothetical drug use rate of 2% in a group of 500 employees (as apposed to 50,000 employees), there will be fewer employees on drugs. And, therefore, fewer opportunities to potentially document or discover an individual drug problem.

drivers); *Hartness*, 919 F.2d at 172-74 (executive office employees with "secret" national security clearances); *Yeutter*, 918 F.2d at 971 (shuttle bus drivers); *Dimeo v. Griffin*, 943 F.2d 679, 683-85 (7th Cir. 1991) (horse racing jockeys); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986) (same); *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559, 562-65 (5th Cir. 1998) (custodians in the public schools); *Harmon v. Thornburgh*, 878 F.2d 484, 488-92 (D.C. Cir. 1989) (Department of Justice personnel with top secret clearance); *National Federation of Federal Employees v. Cheney,* 884 F.2d 603, 610 (D.C. Cir. 1989) (aircraft personnel); *American Federation of Government Employees v. Skinner*, 885 F.2d 884, 891 (D.C. Cir. 1989) (motor vehicle operators); *see also Smith v. Fresno Irrigation District*, 84 Cal. Rptr. 2d 775, 782-88 (Cal. Ct. App. 1999) (construction and maintenance workers); *Boesche v. Raleigh-Durham Airport Authority*, 432 S.E.2d 137, 140 (N.C. Ct. App. 1993) (airport maintenance mechanics).

In this context, it becomes clear that the Arizona Supreme Court improperly used the lack of documented drug use—or even a rumor of drug use[12]—to unfairly minimize the real and substantial risk to public safety involved with potential drug use among firefighters.

The gravity of the potential harm, alone, can be sufficient to warrant random drug testing. *Von Raab*, 489 U.S. at 674-75; *see also Hartness*, 919 F.2d at 173 ("We consistently assumed that some jobs . . . *create sufficiently grave risks* as to make random drug testing reasonable in all circumstances." (emphasis added)). The firefighter's job is one

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[12] The court noted that "the record includes not even an allegation or rumor that the City's firefighters used or abused drugs or alcohol," (App. 8a.), thus raising the question of whether the Arizona Supreme Court would find a sufficient interest for random drug testing based only on rumor.

involving the kind of grave risks that make random drug testing reasonable. *Hatley,* 164 F.3d at 604 ("Petitioner was a firefighter. The safety of others was in his hands, and impairment due to drug use could well have led to otherwise avoidable injury or death"); *see also Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) ("[The municipality] has a compelling interest in ensuring that the duties of fire fighters and police officers are performed free of any risk of impairment by the use of illegal drugs.").[13] Firefighters are the front-line responders to local emergencies. They administer invasive medical treatment, have access to and administer prescription drugs, operate large emergency vehicles outside the bounds of normal traffic control laws, and are called upon to perform heroic rescues in times of crisis. In the Arizona Supreme Court's words,

> The safety risks associated with becoming a firefighter are well known. We entrust firefighters with protecting both the community at large and their colleagues from danger, while putting their own well-being at great risk of harm. A firefighter's ability to do this job in a safe and effective manner depends, in substantial part, on his or her health and fitness.

(App. 12a.) And as seen during and since September 11th, firefighters are an integral part of this country's ability to respond to terrorism. Firefighters' duties, no less than railroad engineers' duties, are "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628. And in firefighting, like aviation, "[a] single drug-related

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[13] As the Arizona court of appeals recognized: "Given the daunting responsibilities they must shoulder on a moment's notice, firefighters expect, and necessarily accede to, more governmental regulation than most workers. Because the trust placed in them is so great, the need to detect a firefighter who is impaired at work is equally great." (App. 30a-31a.)

lapse by any covered employee could have irreversible and calamitous consequences." *Cheney*, 884 F.2d at 610. Where "the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." *Von Raab*, 489 U.S. at 675.

In short, deterrence of drug abuse in a profession with the potential for catastrophic harm constitutes a compelling government interest warranting random drug testing of these employees. "Random drug testing, as compared with other forms of testing, offers the best potential deterrent to drug use. This factor, coupled with the possibility of a catastrophic accident, is sufficient to show a strong governmental interest in random testing." *International Brotherhood of Electrical Workers Local 1245 v. Skinner*, 913 F.2d 1454, 1463 (9th Cir. 1990); *see also Von Raab*, 489 U.S. at 674-75; *Brotherhood of Teamsters*, 932 F.2d at 1305; *Bluestein*, 908 F.2d at 456.

The Mesa fire department's good fortune of not having any fatalities or injuries due to drug use does not eliminate the future threat to the public should a firefighter abuse drugs. Mesa should be allowed to use the same reasonable measures that other governmental entities have been authorized to use to minimize risks to the public.

B. The Decision Creates a New Standard for Determining the Individual Interest Involved.

The other side of the special needs balancing test requires an examination of the individual's Fourth Amendment interests. *Vernonia*, 515 U.S. at 654-58. The Arizona Supreme Court, here, improperly made the random aspect of the drug testing policy the crux of the inquiry in analyzing the individual's privacy interest. The Court begins the analysis by appropriately recognizing that firefighters have a "diminished expectation of privacy and should reasonably expect

some intrusion into matters involving their health and fitness." (App. 12a.) *See also Doe v. City and County of Honolulu*, 816 P.2d 306, 314-15 (Haw. Ct. App. 1991) (finding firefighters have a diminished expectation of privacy and should expect inquiry into their fitness and probity).

The Arizona Supreme Court also found that Mesa's procedural safeguards for testing "work to reduce the intrusiveness of the privacy invasion." (App. 13a.) The Court, actually, understated the effect of these safeguards. Mesa's procedural safeguards were patterned after the federal standards adopted by the Department of Health and Human Services.[14] This Court has already found that safeguards nearly identical to Mesa's rendered the intrusion of drug testing "negligible." *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822, 833 (2002) ("Given that we considered the method of collection in *Vernonia* a 'negligible' intrusion, the method here is even less problematic." (citation omitted)); *Vernonia* 515 U.S. at 658 ("Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible").

The Arizona Supreme Court then departs from this Court's analysis that such intrusions are negligible by embracing the analysis of the Alaska Supreme Court, which equated random testing to "a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time."[15] The Alaskan court, however, was interpreting privacy interest under its state constitution. The Arizona Supreme Court has now engrafted this Alaskan state

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[14] Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs, 49 C.F.R. 40 (2003).

[15] (App. 15a.) (citing *Anchorage Police Department Employees Association. v. Municipality of Anchorage*, 24 P.3d 547, 557-58 (Alaska 2001)).

constitutional analysis onto the Fourth Amendment of United States Constitution.

Simply, the Arizona Supreme Court decision equates random testing to "continuous and unrelenting government scrutiny"[16] that creates "fear and surprise."[17] In so doing, the court mushroomed the privacy intrusion from negligible to substantial and prohibited. No other court has made the random aspect of a drug testing policy a cornerstone in analyzing the individual's Fourth Amendment interest.

Other courts certainly have considered the random aspect of a testing policy as part of the balancing test, but not a decisive or significant factor. *See, e.g., Brotherhood of Teamsters,* 932 F.2d at 1303 ("[w]hile random testing by definition involves some element of surprise, the amount of anxiety should not be substantial"). In a "particularly close case," the limited surprise from random testing can be a relevant consideration that may tip the scales. *Id.* (*citing Bluestein*, 908 F.2d at 456-57). There is no authority, however, for treating it as the Arizona Supreme Court did—as the crux in determining the privacy intrusion. The Arizona Supreme Court's new rule—that randomness transmutes a negligible intrusion into a substantial and prohibited intrusion—conflicts with principles from this Court and decisions from circuit courts.[18]

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[16] (App. 15a.)

[17] (App. 10a.)

[18] Common sense also undermines the Arizona Supreme Court's logic. It is illogical to believe that the lack of advance notice of a "negligibly intrusive" drug test will cause the kind of "fear and surprise" in firefighters that would catapult their privacy interests above the substantial governmental interest in ensuring a drug-free fire department, when those same firefighters are called upon and are expected to—randomly and without notice—respond calmly and professionally to tragic and often graphically disturbing catastrophes.

In summary, the Arizona Supreme Court's decision conflicts with the decisions of this Court and with those of the Third,[19] Fourth,[20] Fifth,[21] Sixth,[22] Seventh,[23] Ninth,[24] Federal,[25] and the D.C. Circuits.[26] Because its resolution of this important federal question conflicts with the decisions of this Court and many circuit courts, the City of Mesa respectfully requests the Court to grant the writ.

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[19] *Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133, 141 (3d Cir. 1988) (upholding random testing of police officers without evidence of drug abuse in department).

[20] *Thomson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989) (civilian biochemists and pipe fitters in U.S. Army subject to random testing).

[21] *Aubrey*, 148 F.3d at 562-65 (school custodian constitutes safety-sensitive position subject to random testing).

[22] *Knox County Ed. Ass'n v. Knox County Bd. of Ed.*, 158 F.3d 361, 373-83 (6th Cir. 1998) (drug history not required to randomly test teachers).

[23] *Dimeo*, 943 F.2d at 683 (significant government interest to test jockeys due to potential accidents and loss of tax revenues from gambling); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

[24] *Bhd. of Teamsters*, 932 F.2d at 1300 ("scarce" evidence of drug use does not prevent random testing of commercial drivers); *Bhd. of Elec. Workers*, 913 F.2d at 1463 (potential for catastrophic consequences justifies random testing in pipeline industry despite lack of drug use history).

[25] *Hatley*, 164 F.3d at 605 (upholding random suspicionless drug testing of firefighters).

[26] *Yeutter*, 918 F.2d at 971-72 (shuttle bus drivers randomly tested without history of drug abuse); *Harmon*, 878 F.2d at 488-92 (evidence of drug use not needed to randomly test attorneys with top secret clearance); *Cheney*, 884 F.2d at 610 (aircraft attendants tasks are "fraught with extraordinary peril," warranting random testing); *American Fed'n of Gov't Employees*, 885 F.2d at 891 (random testing of motor vehicle operators "intimately related" to public safety).

II. THE ARIZONA SUPREME COURT'S DECISION CONFLICTS WITH FEDERAL STATUTES AND REGULATIONS THAT REQUIRE RANDOM DRUG TESTING OF SAFETY-SENSITIVE POSITIONS.

Federal statutes and regulations mandate the random drug testing of certain safety-sensitive employees. These federal regulations require Mesa to randomly test approximately five hundred of its employees (such as gas pipeline workers, solid waste equipment operators, fleet mechanics, and street and park maintenance personnel). The Arizona Supreme Court's decision in this case places Mesa in a potentially untenable position: being federally required to randomly drug test its employees under conditions the Arizona Supreme Court held to be unconstitutional.

Federal law requires random drug testing of certain employees holding safety-sensitive positions.[27] States and cities, like Mesa, that employ such persons must randomly drug test those employees[28] to be eligible for federal highway funds.[29] For example, all employees required to operate a commercial vehicle must hold a commercial driver's license (CDL) and are subject to random testing under the federal regulations.[30] While firefighters in Arizona are not required to hold a CDL, there are approximately four hundred employees in Mesa that do operate commercial vehicles, and thus are subject to fed-

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[27] Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331 (1991); Federal Aviation Administration, 14 C.F.R. § 61 (2003); Federal Motor Carrier Safety Administration, 49 C.F.R. § 382 (2003); Federal Railroad Administration, 49 C.F.R. § 219 (2003); Federal Transit Administration, 49 C.F.R. § 655 (2003); Research and Special Programs Administration, 49 C.F.R. § 199 (2003).

[28] *See, e.g.*, 49 C.F.R. § 382; 383; 384 (2003); 49 C.F.R. § 199 (2003).

[29] 49 U.S.C. § 5331(g).

[30] 49 C.F.R. § 382.107; 382.305; 384.201 (2003).

erally mandated random drug testing. Similarly, people who operate, maintain, or provide emergency response for pipelines or liquefied natural gas are safety-sensitive and are required to be randomly drug tested.[31] Mesa employs approximately 100 people who are randomly tested under these requirements.

None of these federal regulations make an exception for municipalities having no history of drug abuse, nor, obviously, is the "unannounced" nature of the test an overriding concern that serves to obviate the need and requirement for random testing. Under the Arizona Supreme Court's decision in this case, however, if there is no historical evidence of drug abuse within the specific department being tested, there is an insufficient government interest to support random testing. Moreover, if the test is random, the Arizona Supreme Court has now held that this constitutes a substantial infringement on the individual's privacy interest.

Whether Mesa's departments subject to mandatory federal testing have a sufficient (or any) history of drug abuse is unknown. Presumably, however, as with Mesa's firefighters, random testing of departmental employees with no history of drug abuse would be struck down under the precepts set forth by the Arizona Supreme Court. Neither the City of Mesa, nor any other city in Arizona, should be forced to choose between following federal statutory mandates or following the Arizona Supreme Court's decision. Mesa, and all other Arizona cities need this Court's guidance on this important federal issue.

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[31] *See* 49 C.F.R. § 199.

III. THE ARIZONA SUPREME COURT'S DECISION WILL HAVE A SUBSTANTIAL ADVERSE IMPACT ON MUNICIPALITIES' ABILITY TO SERVE THEIR COMMUNITIES IN ESSENTIAL, SAFETY-SENSITIVE SERVICES.

No one disputes that firefighters are an integral component of society's safety and well-being. A few minutes' delay due to impaired abilities could make the difference between life and death.[32] And since September 11th, firefighters have become an even more important and visible part of our nation's defense and response to terrorism. On this background, one cannot overstate the importance of Mesa's governmental interest in proactively protecting the public from the very real dangers that drug abuse would cause in this safety-sensitive profession. The Arizona Supreme Court's decision compromises the City's ability to maintain the integrity of safety-sensitive professions from drug abuse, and unwisely forces the public to "bear the risk" that firefighters may be under the influence of drugs while performing their duties.

On a larger scale, the decision could be applied to municipal entities other than fire departments. Its analysis can, and undoubtedly will, be employed in analyzing the validity of—and potentially in striking down—random drug testing for all similar safety-sensitive professions.

Finally, the decision raises new issues as to what will constitute sufficient documented drug use to justify random testing. Will deaths or injuries due to drug use have to be

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[32] *County of Honolulu,* 816 P.2d at 316 ("[Firefighters must] respond quickly and effectively at a moment's notice. Impaired abilities caused by drug use may beget delays in responding to fires or other public emergencies. A few minutes could mark the difference between saving one of several occupants in a building or losing the occupants and/or the structure in a blaze.").

suffered before a defined risk exists? Or, is one documented drug abuser (or several) within a department sufficient? Or, as the court intimated, will rumors of abuse suffice? Whatever the answer, in no case should a program of deterrence be forced to await the blossoming of a drug abuse problem within a specific department. As this Court observed in the context of randomly testing students: "Indeed it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." *Earls*, 536 U.S. at 836.

It can hardly be in the public's best interest to prevent Mesa from using reasonable measures to minimize future risks to its citizens. For the citizens of Mesa and other municipalities, this Court should grant review.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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May 26, 2004

APPENDICES

APPENDIX A

SUPREME COURT OF ARIZONA
EN BANC

[Filed Jan. 27, 2004]

No. CV-03-0100-PR

CRAIG W. PETERSEN,
Plaintiff-Appellee,

v.

CITY OF MESA,
Defendant-Appellant.

OPINION

McGREGOR, *Vice Chief Justice.*

This case requires us to determine the constitutionality of a city's random, suspicionless drug testing of its firefighters. We exercise jurisdiction pursuant to Article VI, Section 5.3 of the Arizona Constitution, Arizona Revised Statutes (A.R.S.) section 12-120.24, and Rule 23 of the Arizona Rules of Civil Appellate Procedure.

I.

Craig Petersen works as a firefighter for the City of Mesa. In 2001, after Petersen was hired, the City implemented a substance abuse program (the Program) for the Mesa Fire Department. The Program requires testing of firefighters (1) if the Department has reasonable suspicion to believe an individual firefighter has abused drugs or alcohol; (2) after a firefighter is involved in an accident on the job; (3) following a firefighter's return to duty or as a follow-up to "a deter-

mination that a covered member is in need of assistance"; and (4) "on an unannounced and random basis spread reasonably throughout the calendar year."

Under the Program's random testing provision, a computer program selects the firefighters to be tested. The Department notifies firefighters of their selection for random testing immediately before, during, or after work; the firefighters are to be tested within thirty minutes of their notification, with allowance for travel time to the laboratory for collection. Once at the laboratory, firefighters are permitted to use private bathroom stalls when providing urine samples, which are then inspected by a monitor for the proper color and temperature.

The laboratory tests the sample for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine.[1] The laboratory initially tests the specimens by using an immunoassay test that meets the requirements of the Food and Drug Administration for commercial distribution. The laboratory then confirms all positive test results using the gas chromatography/mass spectrometry technique and reports positive results to a Medical Review Officer (MRO), who has a "detailed knowledge of possible alternate medical explanations." The MRO reviews the results before giving the information to the Department's administrative official. Only confirmed tests are reported to the Department as positive for a specific drug. Before verifying a positive result, however, the MRO must contact the firefighter on a confidential basis.

The Department does not release information in a firefighter's drug testing record outside the Department without the firefighter's consent. A firefighter whose test reveals a blood alcohol concentration in excess of that allowed under

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[1] In addition, twenty percent of those tested are selected for an alcohol breath test.

the Program or who tests positive for any of several specified drugs is removed from all covered positions and is evaluated by a substance abuse professional. The Department may discipline or terminate the employment of a firefighter who tests positive a second time or who refuses to submit to a required test.

According to section 8 of the Program, the primary purpose of the random testing component "is to deter prohibited alcohol and controlled substance use and to detect prohibited use for the purpose of removing identified users from the safety-sensitive work force." This purpose advances the City's goal of establishing "a work environment that is totally free of the harmful effects of drugs and the misuse of alcohol."

Petersen filed a complaint in superior court seeking declaratory and injunctive relief, alleging that the random testing component of the Program violated his rights under both *Article II, Section 8 of the Arizona Constitution* and the Fourth Amendment to the United States Constitution.[2] The trial court held that the Program violated the Arizona Constitution and permanently enjoined the Department from continuing random, suspicionless drug and alcohol testing of the City's firefighters. The court of appeals reversed, holding that the Program's random testing component is reasonable under both the Arizona and United States Constitutions. The court reasoned that the City's "compelling need to discover specific but hidden conditions representing grave risks to the health and safety of the firefighters and the public" outweighed Petersen's privacy interests. *Petersen v. City of Mesa*, 204 Ariz. 278, 286 ¶ 34, 63 P.3d 309, 317 (App.2003).

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[2] Petersen does not challenge testing on the basis of reasonable suspicion, after an on-the-job accident, following a return to duty, or as a follow-up to "a determination that a covered member is in need of assistance." As a result, we express no opinion regarding the constitutionality of these Program provisions.

Judge Hall dissented from the majority's conclusion that the random testing component of the Program is reasonable under the Fourth Amendment. *Id.* at 290-91 ¶ 49, 63 P.3d at 321-22 (Hall, J., concurring in part and dissenting in part).

Under the analysis set forth below, we hold that the Program's random testing component is unreasonable and therefore violates the Fourth Amendment to the United States Constitution.[3]

II.

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613-14, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In this case, the parties agree

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[3] Petersen argues that Article II, Section 8 of the Arizona Constitution, which expressly provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law," affords greater protection against drug testing than does the Fourth Amendment. Our conclusion that the random testing component violates the Fourth Amendment obviates the need to consider whether the protections granted by the Arizona Constitution extend beyond those afforded defendants by the federal constitution. Although the Arizona Constitution may impose stricter standards on searches and seizures than does the federal constitution, Arizona courts cannot provide less protection than does the Fourth Amendment. See, e.g., Cooper v. California, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."); Arnold v. City of Cleveland, 67 Ohio St.3d 35, 616 N.E.2d 163, 169 (1993) ("In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.").

that the City's collection and testing of a firefighter's urine and breath constitutes a "search" under the Fourth Amendment. *See, e.g., id.* at 617, 109 S.Ct. 1402 ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . these intrusions must be deemed searches under the Fourth Amendment.").

As the language of the Fourth Amendment makes clear, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). To be reasonable, a search generally must be based upon some level of individualized suspicion of wrongdoing. *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402. The purpose of requiring individualized suspicion "is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Id.* at 621-22, 109 S.Ct. 1402.

The Supreme Court, however, has recognized limited exceptions to this general rule "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Id.* at 619, 109 S.Ct. 1402 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987)). "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* at 624, 109 S.Ct. 1402.

The City concedes that its use of random, suspicionless testing is not based on any level of individualized suspicion. The City argues, however, that such testing is reasonable under the Fourth Amendment because the search "serves special governmental needs, beyond the normal need for law

enforcement." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Because the Department does not disclose test results to law enforcement officers or to other third parties without the firefighter's consent, Petersen recognizes that the Program is unrelated to the normal need for law enforcement. Petersen maintains, however, that the City cannot enforce the Program's random testing component because the City's alleged "special needs" offered in support of the program are insufficient to overcome the privacy intrusion occasioned by the search. Based on the record in this case, we agree.

A.

Neither the Supreme Court nor this court has considered the reasonableness of random, suspicionless testing of city firefighters. The Supreme Court, however, has examined the constitutionality of suspicionless drug testing requirements analogous to the procedures Petersen challenges. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (high school students participating in competitive extracurricular activities); *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (candidates for political office); *Vernonia*, 515 U.S. 646, 115 S.Ct. 2386 (high school students participating in interscholastic athletics); *Skinner*, 489 U.S. 602, 109 S.Ct. 1402 (railway employees); *Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (customs service agents); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281 (2001) (holding unconstitutional a state hospital's drug testing of pregnant patients that involved hospital personnel notifying the police of patients who tested positive for cocaine). As each of these decisions illustrates, when presented with an alleged "special need" in support of a particular Fourth Amendment intrusion, a court must weigh the individual's Fourth Amendment interests against the proffered governmental interests to determine whether the search in question

"fit[s] within the closely guarded category of constitutionally permissible suspicionless searches." *Chandler*, 520 U.S. at 309, 117 S.Ct. 1295.

Applying this "special needs" balancing test to the facts presented in this case, we begin by analyzing the City's proffered interests. Although the City need not present a "compelling" interest, the City's interest must be "important enough" to justify the government's intrusion into the firefighters' legitimate expectations of privacy. *Vernonia*, 515 U.S. at 661, 115 S.Ct. 2386.

The City asserts that it has a "special need" to test firefighters because they occupy safety-sensitive positions. The City alleges that random testing furthers this interest by deterring "prohibited alcohol and controlled substance use" and detecting "prohibited use for the purpose of removing identified users from the safety-sensitive work force." We agree that the City has an interest in deterring and detecting prohibited alcohol and drug use among the City's firefighters.

Fourth Amendment analysis, however, requires that we do more than recognize that the City has an interest in deterring drug use among employees in safety-sensitive positions. In addition, we must look to the nature and immediacy of the City's concern. *Id.* at 660, 115 S.Ct. 2386. That is, has the City identified a real and substantial risk? *Chandler*, 520 U.S. at 323, 117 S.Ct. 1295. If so, will the City's proposed invasion of its firefighters' privacy interests further the City's interest in deterring and detecting drug use among its firefighters? *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402. Answering that question requires that we consider the efficacy of the Program in meeting the City's concern, *Vernonia*, 515 U.S. at 660, 115 S.Ct. 2386, and whether the invasion of privacy is calibrated to the defined risk, *Chandler*, 520 U.S. at 321-23, 117 S.Ct. 1295.

The record before us provides little information about the City's reasons for adopting random testing and provides no evidence to explain the City's perceived need to conduct such testing. As the City conceded at oral argument, the record is devoid of any indication that the City has ever encountered any problem involving drug use by its firefighters. The record lacks not only evidence of even a single instance of drug use among the firefighters to be tested but also any evidence of accidents, fatalities, injuries, or property damage that can be attributed to drug or alcohol use by the City's firefighters. No evidence of record suggests that the firefighters asked for or consented to the testing policy, and the record includes not even an allegation or rumor that the City's firefighters used or abused drugs or alcohol. Based on this record, we detect no real and substantial risk that the public safety is threatened by drug or alcohol use among the firefighters to be tested. The absence of evidence of drug use, at least as reflected in the record, provides no basis for us to conclude that random, suspicionless testing is calibrated to respond to any defined risk. At most, the Program's random testing component furthers only a generalized, unsubstantiated interest in deterring and detecting a hypothetical drug abuse problem among the City's firefighters.[4]

Nonetheless, relying primarily upon *Von Raab, Vernonia,* and *Earls*, the City asserts that the Supreme Court "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." *Earls*, 536 U.S. at 835, 122 S.Ct. 2559. The City's

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[4] While we recognize and applaud the City's interest in deterring drug use among firefighters, the Program also requires testing upon reasonable suspicion, after an accident on the job, and following a return to duty or as a follow-up to "a determination that a covered member is in need of assistance." The record before us provides no basis for concluding that these testing alternatives fail to deter and detect drug use among the City's firefighters.

argument accurately reflects language from the cases upon which it relies. These cases, however, focused on a number of important factors that differ from the facts of this case and therefore offer limited support for the City's argument.

In *Von Raab*, the Court examined the constitutionality of a United States Customs Service program requiring Customs Service employees to submit to suspicionless testing upon promotion or transfer to positions directly involved in the interdiction of illegal drugs or positions that required carrying a firearm. 489 U.S. at 660, 109 S.Ct. 1384. Although the Customs Service did not adopt its policy in response to a history of drug and alcohol abuse problems, *id.*, the plan was developed for an agency that the Court recognized as "our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668, 109 S.Ct. 1384. The Court reasoned that those employees directly involved in drug interdiction or carrying a firearm could jeopardize the agency's "almost unique mission." *Id.* at 674, 109 S.Ct. 1384. As a result, the Court concluded that the Customs Service had a compelling interest in assuring that users of illegal drugs would not be placed in these positions. *Id.* at 670- 71, 109 S.Ct. 1384. In upholding the testing regime, the Court also noted that the testing program provided advance notice of the scheduled sample collection. *Id.* at 672 n. 2, 109 S.Ct. 1384. In addition, the Court focused on the context in which the Service's testing program was implemented, which the Court described as an environment in which "it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Id.* at 674, 109 S.Ct. 1384. Given these particular facts, as the Court later emphatically stated, "[*Von Raab* is] [h]ardly a decision opening broad vistas for suspicionless searches [and it] must be read in its unique context." *Chandler*, 520 U.S. at 321, 117 S.Ct. 1295.

Unlike the Customs Service employees in *Von Raab*, the City's firefighters are not directly involved in drug interdiction, do not carry a firearm, and are not required to use deadly force in the regular course of their duties. In addition, the firefighters' communal work environment provides a better opportunity for supervisors to detect drug use and therefore develop reasonable suspicion to conduct a test under appropriate circumstances. This environment reduces the risk that a firefighter could cause "great human loss before any signs of impairment become noticeable to supervisors or others." *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. Finally, as we discuss below, the element of "fear and surprise" inherent in the Program's random testing procedures results in a broader and more intrusive privacy invasion than did the testing procedures approved in *Von Raab*. *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384 (noting that the advance notice given of the scheduled sample collection reduces "to a minimum any 'unsettling show of authority'" (quoting *Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979))).

Vernonia and *Earls* also provide limited support for the City's random testing of its firefighters. In *Vernonia* and *Earls*, the Court upheld school district policies that required students participating in extracurricular activities to submit to random drug tests. *Earls*, 536 U.S. at 838, 122 S.Ct. 2559 (finding school district policy, which included random testing of students participating in extracurricular activities, to be constitutional); *Vernonia*, 515 U.S. at 664-65, 115 S.Ct. 2386 (upholding school district's policy authorizing random drug testing of students participating in interscholastic athletics). In upholding the policies, the Court emphasized in both decisions that "'Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.'" *Earls*, 536 U.S. at 829-30, 122 S.Ct. 2559 (quoting *Vernonia*, 515 U.S. at 656, 115 S.Ct. 2386).

Firefighters, of course, have little in common with students entrusted to the government's care. As Judge Hall correctly noted, "unlike a public school student['s right to privacy], a firefighter's right to privacy, although limited in some respects, is not inherently 'subject[ ] to greater controls than those appropriate for adults.'" *Petersen*, 204 Ariz. at 289 ¶ 44, 63 P.3d at 320 (Hall, J., concurring in part and dissenting in part) (quoting *Earls*, 536 U.S. at 831, 122 S.Ct. 2559). On this basis alone, we have little trouble distinguishing *Vernonia* and *Earls* from this case.

Moreover, unlike the record in this case, the records in both the *Earls* and *Vernonia* actions presented specific evidence of drug use that supported the districts' decisions to institute the testing regimes. In *Vernonia*, an "immediate crisis," 515 U.S. at 663, 115 S.Ct. 2386, brought about by a "sharp increase in drug use," *id.* at 648, 115 S.Ct. 2386, sparked installation of the testing program. Similarly, the *Earls* Court noted that the "School District ha[d] provided sufficient evidence to shore up the need for its testing program." 536 U.S. at 835, 122 S.Ct. 2559.

Given the dearth of evidence by which we can measure the strength of the City's proffered "special need" and the City's failure to articulate how the Program's random testing procedures further its interests, we conclude that the City has failed to define any real and substantial risk that random, suspicionless testing is designed to address. Nonetheless, because the Supreme Court has stated that a lack of empirical data, by itself, is not fatal to a suspicionless testing program, *Von Raab*, 489 U.S. at 673-75, 109 S.Ct. 1384, we now consider the extent of Petersen's acknowledged Fourth Amendment privacy interests and then balance these interests against the City's generalized, unsubstantiated interest in deterring and detecting substance abuse among the City's firefighters.

B.

The collection of urine and breath samples for purposes of drug and alcohol testing "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner*, 489 U.S. at 616, 109 S.Ct. 1402. Nevertheless, "'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Von Raab*, 489 U.S. at 671, 109 S.Ct. 1384 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987)). In *Skinner*, for example, the Court found that railway employees' expectation of privacy is "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S. at 627, 109 S.Ct. 1402.

As was true of the railway employees in *Skinner*, the City's firefighters possess a diminished expectation of privacy. The safety risks associated with becoming a firefighter are well known. We entrust firefighters with protecting both the community at large and their colleagues from danger, while putting their own well-being at great risk of harm. A firefighter's ability to do this job in a safe and effective manner depends, in substantial part, on his or her health and fitness. In addition, a firefighter, while on duty, lives in a communal environment. Given all these factors, we conclude that individuals who elect to become firefighters should anticipate a diminished expectation of privacy and should reasonably expect some intrusion into matters involving their health and fitness.

The strength of any asserted privacy interest also turns upon the "character of the intrusion." *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386. Although any program that compels urinalysis affects privacy interests, the City has designed its Program to reduce its intrusion upon the firefighters' privacy

interests. *See, e.g., id.* (concluding that "the degree of intrusion depends upon the manner in which production of the urine sample is monitored"). The Program permits firefighters providing samples to use private bathroom stalls at the designated testing facility, where they are not subject to direct monitoring. The firefighter then gives the sample to an authorized monitor for color and temperature testing. The laboratory confirms any initial positive test by using gas chromatography/mass spectrometry techniques, which reduces the specter of a "false positive" test result. *See, e.g.*, Karen Manfield, *Imposing Liability on Drug Testing Laboratories for "False Positives": Getting Around Privity*, 64 U. Chi. L.Rev. 287, 290-92 (1997) (stating that retesting positive results with a properly administered gas chromatography test "would eliminate virtually all the false positives"). The MRO reviews the results and contacts the firefighter on a confidential basis. In addition, the Department does not release testing records outside the Department without the firefighter's consent.

These procedures, which attempt to guard the firefighters' privacy interests to the extent possible, all work to reduce the intrusiveness of the privacy invasion. Nonetheless, given the random nature of these searches, we cannot conclude that "the privacy interests implicated by the search are minimal." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402.

The Supreme Court has not examined random testing procedures outside of the unique school setting. *Earls*, 536 U.S. 822, 122 S.Ct. 2559; *Vernonia*, 515 U.S. 646, 115 S.Ct. 2386. In both *Vernonia* and *Earls*, the Court upheld school district policies requiring students participating in extracurricular activities to submit to random drug testing. In both cases, without directly addressing the privacy implications of a random search, the Court upheld the challenged searches based primarily upon "'the schools' custodial and tutelary

responsibility for children.'" *Earls*, 536 U.S. at 829-30, 122 S.Ct. 2559 (quoting *Vernonia*, 515 U.S. at 656, 115 S.Ct. 2386).

Outside the school context, the Court has recognized that notification in advance of a scheduled search minimizes the intrusiveness of the search. *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384; *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (noting that the intrusion on privacy occasioned by routine checkpoints is minimized by the fact that motorists "are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere"). In *Von Raab*, for example, the Court identified the advance notice given as a factor in upholding the suspicionless testing of Customs Service employees. 489 U.S. at 672 n. 2, 109 S.Ct. 1384. The *Von Raab* Court stated:

> Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions. Employees are also notified in advance of the scheduled sample collection, thus reducing to a minimum any "unsettling show of authority" that may be associated with unexpected intrusions on privacy.

Id. (quoting *Delaware*, 440 U.S. at 657, 99 S.Ct. 1391).

Consistent with the Court's statements in *Von Raab*, a number of federal and state courts have acknowledged the increased privacy concerns occasioned by random testing. *See, e.g., Bluestein v. Skinner*, 908 F.2d 451, 456-57 (9th Cir.1990) (finding the fact that the challenged testing program provided for unannounced and random tests added "some weight to the 'invasion of privacy' side of the Fourth Amendment balance"); *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C.Cir.1989) ("Certainly the random nature of

the . . . testing plan is a *relevant* consideration; and, in a particularly close case, it is possible that this factor would tip the scales."); *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001). In *Anchorage,* for example, the Alaska Supreme Court, relying upon the Alaska Constitution, concluded that the random testing of firefighters is qualitatively different from suspicionless testing that occurs prior to employment, upon promotion, demotion or transfer, and after a traffic accident. *Anchorage*, 24 P.3d at 557. The court reasoned:

> Because the policy's provision for random testing could subject employees to "unannounced" probing throughout the course of their employment, the tests are peculiarly capable of being viewed as "unexpected intrusions on privacy." For example, it might seem manifestly unreasonable for any person applying for a safety-sensitive position in a heavily regulated field of activity not to anticipate—and implicitly agree to—a probing inquiry into the applicant's capacity to perform job-related duties; the same would hold true for any employee who might be promoted, demoted, transferred, or become involved in a job-related accident. But a job applicant or employee who anticipated such inquiries might nevertheless expect not to be subjected to a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time. Such expectations cannot be so readily dismissed as patently unreasonable.

Id. at 557-58 (citations omitted).

Although the Alaska Supreme Court analyzed the Anchorage plan under its state constitution, we find the court's reasoning about the difference between random and announced or scheduled tests persuasive. The very nature of random, suspicionless searches precludes any advance notification and subjects employees to continuous government

scrutiny. Random testing, therefore, necessarily raises the specter of the "'unsettling show of authority' that may be associated with unexpected intrusions on privacy." *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384 (quoting *Delaware*, 440 U.S. at 657, 99 S.Ct. 1391). Accordingly, we conclude that random, suspicionless drug testing, while not *per se* unreasonable, invades reasonable privacy interests even when the government collects the urine sample in a relatively unintrusive manner and takes steps to protect employees' privacy interests by limiting the information that is disclosed.

III.

Balancing Petersen's privacy interests against the interests the City advances in favor of the Program's random component, we conclude that the City's generalized and unsubstantiated interest in deterring and detecting alcohol and drug use among the City's firefighters by conducting random drug tests is insufficient to overcome even the lessened privacy interests of the firefighters in this case. The situation we consider, on this record, cannot be described as one of the "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, [and in which] a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402. Rather, the increased intrusion occasioned by the Program's random, suspicionless testing component represents the very type of "arbitrary and invasive acts by officers of the Government or those acting at their direction" against which the Fourth Amendment is meant to guard. *Id.* at 613-14, 109 S.Ct. 1402. We therefore hold, on the record before us, that the Program's random component falls outside the "closely guarded category of constitutionally permissible

suspicionless searches," *Chandler,* 520 U.S. at 309, 117 S.Ct. 1295, and violates the Fourth Amendment to the United States Constitution.

IV.

For the foregoing reasons, we vacate the court of appeals' opinion and affirm the trial court's judgment enjoining the City from enforcing the random, suspicionless component of the Program.

CONCURRING: CHARLES E. JONES, *Chief Justice*, REBECCA WHITE BERCH, MICHAEL D. RYAN and ANDREW D. HURWITZ, *Justices*.

APPENDIX B

COURT OF APPEALS OF ARIZONA,
DIVISION 1, DEPARTMENT B.

[Filed] Feb. 25, 2003

No. 1 CA-CV 02-0016

CRAIG W. PETERSEN,
Plaintiff-Appellee,

v.

CITY OF MESA,
Defendant-Appellant.

Review Granted Sept. 9, 2003

OPINION

VOSS, *Judge.*

Craig W. Petersen, a firefighter for the City of Mesa, challenged the constitutionality of the random testing component of the City's proposed Substance Abuse Program Alcohol and Controlled Substance Testing Policy and Procedures (Policy). In awarding summary judgment to Petersen and permanently enjoining the City from implementing the random, suspicionless aspect of the Policy, the trial court relied on Article 2, Section 8 of the Arizona Constitution. In this context, however, we conclude that the strictures imposed by our constitution are no greater than those of the Fourth Amendment of the United States Constitution and that random testing is not an unreasonable search in violation of

either constitution. We therefore reverse the summary judgment in favor of Petersen and vacate the injunction.

BACKGROUND

In response to Petersen's complaint for declaratory and injunctive relief, the City filed a motion to dismiss. When both parties submitted additional supporting information, the trial court treated the motion as one for summary judgment. After a hearing, the trial court found that no material facts were in dispute but that the random, suspicionless drug and alcohol testing component[1] violated Article 2, Section 8 of the Arizona Constitution. That provision states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The trial court cited *State v. Ault*, 150 Ariz. 459, 463, 466, 724 P.2d 545, 549, 552 (1986) (Article 2, Section 8 bars admission of evidence seized during illegal search of home), and *State v. Tykwinski*, 170 Ariz. 365, 371, 824 P.2d 761, 767 (App.1991) (rejecting assertion that Article 2, Section 8, although more extensive than Fourth Amendment, requires individualized suspicion to conduct roadblock stop), in support of its conclusion that Arizona's Constitution "is broader and more explicit than the Fourth Amendment in safeguarding the fundamental liberty of Arizona citizens."[2] The court also relied on an Alaska Supreme Court decision that interpreted the Alaska Constitution to bar ongoing random drug testing as overly intrusive of employee privacy

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[1] The Policy allows for random breath and urine testing. Because the complaint, briefs, and trial court's order do not distinguish between the two types of testing for purposes of constitutional analysis, our decision similarly does not distinguish between the two types.

[2] The Fourth Amendment of the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

because the testing was not based on "predictable, job-related occurrences" and was not implemented in response to demonstrated drug abuse in the workplace. [3]*See Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 558-59 (Alaska 2001). The trial court concluded that the City failed to demonstrate a compelling interest to justify the intrusion on Petersen's reasonable expectation of privacy and therefore enjoined random, suspicionless testing.

DISCUSSION

In reviewing a trial court's ruling on the reasonableness of a government search, we defer to that court's factual findings, but we determine de novo whether the search was unreasonable and thus violated the Constitution. *State v. Adams*, 197 Ariz. 569, 572, ¶ 16, 5 P.3d 903, 906 (App.2000).

A. The City's Policy

The stated purpose of the City's Policy is to provide firefighters "with a safe, productive working environment"; to ensure "the safety and well- being of the general public"; to ensure that firefighters "receive educational [sic] and training on substance abuse"; and to ensure that they "are well informed on the hazards of substance abuse and are provided employee assistance as needed."

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[3] The dissent also relies on this case although the Alaska Supreme Court expressly eschewed reference to the Fourth Amendment. Anchorage Police Dep't, 24 P.3d at 550 ("[W]e base our ultimate ruling exclusively on the Alaska Constitution.").

Firefighters must submit[4] to testing of breath or urine[5] "on an unannounced and random basis spread reasonably throughout the calendar year." A computer software program selects the employees to be tested. Those selected are not given any advance notice and can be notified immediately before, during, or immediately following work. All tests are to be conducted within thirty minutes of selection, with allowance for travel time to the collection location. When urine is to be collected, the employee may use a private bathroom stall. A monitor inspects the sample for proper color and temperature and then bottles and labels the sample for shipping.

A firefighter who refuses to submit to a test is terminated from employment. A firefighter whose breath test reveals an alcohol concentration of 0.04 or higher or whose urine sample is "positive" for any of several specified drugs is removed from duty and evaluated by a substance abuse professional. Any firefighter who tests positive a second time is terminated from employment. Information in a firefighter's drug testing records is not released outside the department unless the firefighter consents.

B. Article 2, Section 8 of the Arizona Constitution

We first address whether the trial court correctly found that Article 2, Section 8 provides greater protection for privacy rights than the Fourth Amendment in the context of drug testing. In three criminal cases involving warrantless police entry of a home, our supreme court has interpreted the words of Article 2, Section 8, "[n]o person shall be disturbed in his

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[4] Firefighters must also submit to post-accident as well as reasonable suspicion testing and, in certain circumstances, return-to-duty and follow-up testing. Petersen does not challenge these portions of the Policy.

[5] Test samples are screened only for the presence of marijuana and cocaine metabolites, morphine, phencyclidine, amphetamine, codeine, and methamphetamine.

private affairs or his home invaded, without authority of law," to provide an independent state law ground for safeguarding the home and the privacy interests therein against a government search.

In *Ault*, after noting that the Arizona Constitution "generally . . . incorporate[s] federal protections," the court held that Article 2, Section 8 is "specific in preserving the sanctity of homes and in creating a right of privacy." 150 Ariz. at 466, 724 P.2d at 552. Thus, police could not enter a home without a warrant or any exigency, illegally arrest the occupant, and seize evidence in plain view. *Id.* at 464, 466, 724 P.2d at 550, 552. The court also observed that the inevitable discovery doctrine had been limited to searches of a car and of a hotel room. *Id.* at 465, 724 P.2d at 551.

Concern that the Fourth Amendment might not bar a warrantless entry for police to "secure" and inspect a home while awaiting a warrant led the court, in *State v. Bolt*, to clarify that "[s]uch entries are 'per se unlawful' under our state constitution." 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (quoting *State v. Cook*, 115 Ariz. 188, 194, 564 P.2d 877, 883 (1977)). But, the court rejected as "poor judicial policy" adoption of inconsistent state and federal exclusionary rules and held that the state rule would mirror that of the federal courts. *Id.* at 269, 689 P.2d at 528.

Finally, in *State v. Martin*, police entered a home and conducted a "sweep" without a warrant. 139 Ariz. 466, 470, 679 P.2d 489, 493 (1984). The court cited the Fourth Amendment's chief purpose, to guard against intrusion of the home and the associated privacy rights of the occupant, *id.* at 473, 679 P.2d at 496, to hold that under either the federal or state Constitution, the entry was illegal. *Id.* at 474, 679 P.2d at 497.

Thus, despite suggestions that Article 2, Section 8 may exceed the scope of the Fourth Amendment, in general our

courts have found Arizona's Constitutional protection of privacy to be consistent or coextensive with that of the Fourth Amendment. *See, e.g., Mazen v. Seidel*, 189 Ariz. 195, 199, 940 P.2d 923, 927 (1997) (holding warrantless entry of rented storage unit by police and their seizure of contraband after firefighters' valid initial entry is permitted by both Arizona Constitution and Fourth Amendment); *State v. Krantz*, 174 Ariz. 211, 215, 848 P.2d 296, 300 (App.1992) (finding Article 2, Section 8 does not exceed Fourth Amendment and does not forbid warrantless taking of blood to test its alcohol content); *State v. Allgood*, 171 Ariz. 522, 523-24, 831 P.2d 1290, 1291-92 (App.1992) (noting that more expansive reading of Arizona's Constitution is "generally not applied beyond the home" and that police interception of confrontation call violated neither federal nor state constitutions); *State v. Wedding*, 171 Ariz. 399, 407, 831 P.2d 398, 406 (App.1992) (distinguishing Bolt, Ault, and Martin as concerned with warrantless entry of a home); *State v. Calabrese*, 157 Ariz. 189, 190- 91, 755 P.2d 1177, 1178-79 (App.1988) (declining to narrow, on Arizona constitutional grounds, right of police to seize evidence found during warrantless search incident to lawful arrest).

While our courts have vigorously guarded the sanctity of the home from warrantless intrusions by law enforcement officers,, nothing in the cited cases or in the text of Article 2, Section 8 persuades us that the latter provides more protection than the Fourth Amendment when the government conducts a search of a firefighter's urine for the presence of illegal drugs. *See Bolt*, 142 Ariz. at 264, 689 P.2d at 523 (recognizing need for uniformity between federal and state courts and that our constitution generally incorporates federal protections); *State v. Pelosi*, 68 Ariz. 51, 57, 199 P.2d 125, 129 (1948), overruled in part on other grounds, *Adams v. Bolin*, 74 Ariz. 269, 275, 247 P.2d 617, 621 (1952) (Article 2, Section 8's purpose is to preserve Fourth Amendment rights); *Malmin v. State*, 30 Ariz. 258, 261, 246 P. 548, 549 (1926)

(although its language may differ from Fourth Amendment, Article 2, Section 8 has "same general effect and purpose" and will be similarly interpreted).

Accordingly, we hold that in the context of the City's drug and alcohol testing program, the bounds of Article 2, Section 8 do not exceed those of the Fourth Amendment. We now turn to whether the random aspect of the testing is an unreasonable search prohibited by the Fourth Amendment and by the coextensive reach of the Arizona Constitution.

C. Validity of Random, Suspicionless Drug Testing

At the outset, we note that although the United States Supreme Court has approved employee drug testing in some contexts, it has not yet addressed random drug testing of firefighters. Therefore, we begin with a brief overview of the Court's general analysis of drug testing programs. Government-compelled collection and testing of urine for evidence of illegal drug use is a search subject to the Fourth Amendment. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (allowing random drug testing of high school athletes); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 617, 633, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (upholding drug and alcohol testing of railroad employees after accidents or violations of safety rules). To determine whether a government search is reasonable, the Court has balanced the degree of the intrusion on individual privacy against the extent to which the intrusion promotes legitimate governmental interests. *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402. The precise contours of the Fourth Amendment protection, of course, turn on the facts and may vary depending on whether the search invades expectations of privacy in a home, a vehicle, the workplace, a public school, or a park. *See Vernonia*, 515 U.S. at 654, 115 S.Ct. 2386.

Generally, a government search for evidence of criminal conduct is reasonable if a neutral magistrate first determines that probable cause exists to believe described evidence may be found in the place to be searched. *See, e.g., Payton v. New York*, 445 U.S. 573, 586 n. 24, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Ault*, 150 Ariz. at 466-67, 724 P.2d at 552-53. But, neither a search warrant nor probable cause are necessary if " 'special needs,' " beyond law enforcement's normal concerns with crime detection, render the warrant or probable cause requirement "impracticable." *Vernonia*, 515 U.S. at 653, 115 S.Ct. 2386 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (approving warrantless search of a probationer's home)).

For example, in Skinner, the railroads had a special need, in order to prevent drug or alcohol-related accidents, to ban workers' use of alcohol or drugs and to test their blood or urine to assure the ban's effectiveness. 489 U.S. at 620-21, 109 S.Ct. 1402. Because the authorizing regulations identified the circumstances justifying the testing and the conditions under which it occurred, "there [were] virtually no facts for a neutral magistrate to evaluate." *Id.* at 622, 109 S.Ct. 1402. More importantly, when delay to seek a warrant would seriously impede the collection of critical evidence, the balance tipped in favor of finding a warrantless intrusion reasonable. *Id.* at 623-24, 109 S.Ct. 1402.

The testing in *Skinner* was not random, but it was also not based on individualized suspicion. *Id.* at 624, 109 S.Ct. 1402. The Court nevertheless concluded that by working in a highly regulated industry, the employees had diminished expectations of privacy, *id.* at 627, 109 S.Ct. 1402, and that the interest in testing was "compelling," in part because of the difficulty in detecting in any other way employees who were impaired while at work. *Id.* at 628-29, 109 S.Ct. 1402.

The Supreme Court similarly found a special need to exist when the United States Customs Service adopted a drug

testing program for employees who sought a transfer or promotion to positions that were directly involved in drug interdiction or law enforcement or that required the employee to carry a firearm or to handle classified material. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660-61, 666, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).[6] The program's aim was to deter drug use among those seeking promotion and to bar drug users from being promoted to such positions, thus serving governmental interests apart from those of law enforcement. *Id.* at 666, 109 S.Ct. 1384. As in *Skinner*, no special facts demanded a magistrate's evaluation: testing was automatic and anticipated by applicants for the specified positions, and requiring a warrant would deflect valuable resources from the agency's primary mission. *Id.* at 666-67, 109 S.Ct. 1402.

Additionally, the Court found that traditional ideas of probable cause "may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent . . . hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Id.* at 668, 109 S.Ct. 1402 (citations omitted). The strong interest in ensuring the integrity, judgment, and fitness of employees who were directly involved in drug interdiction or were going to be armed, and in protecting the public from impaired employees, *id.* at 670-71, 109 S.Ct. 1402, outweighed the privacy interests of those subject to testing. *Id.* at 672, 109 S.Ct. 1402. "Because successful performance

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[6] Compare *Chandler v. Miller*, 520 U.S. 305, 318-22, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), in which the Court held that no special need supported state-mandated, suspicionless drug testing of candidates for state offices. No drug problem existed among officials; public scrutiny could as effectively detect and deter illicit drug use; and most officials did not perform "high risk, safety sensitive tasks"; thus, the special need was largely symbolic rather than real.

of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness." *Id.*

In the instant case, Petersen and our dissenting colleague strenuously contend that neither *Skinner* nor *Von Raab* approved random testing and that the City cannot institute a drug and alcohol testing program unless it is founded on individualized suspicion and a history of drug or alcohol abuse in the workplace. *Von Raab* clearly held, however, that when the Government's purpose is to discover or prevent from arising hidden conditions that create safety concerns, such as employees' impairment by drugs or alcohol while at work, its purpose may justify searches "without any measure of individualized suspicion." *Id.* at 668, 109 S.Ct. 1384 (emphasis added). The "compelling interest" in avoiding the public harm from impaired employees, *id.* at 670-71, 109 S.Ct. 1384, particularly in light of the "special, and obvious, physical and ethical demands" on those employees, *id.* at 679, 109 S.Ct. 1384, outweighed the intrusion on the employees' privacy, even if no drug abuse problem had prompted the testing program. *Id.* at 660, 109 S.Ct. 1384.

More recently, and again in the absence of a serious drug problem, the Supreme Court upheld drug testing of middle and high school students who participated in extracurricular activities. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822,—, 122 S.Ct. 2559, 2562-63, 153 L.Ed.2d 735 (2002). The school district's testing policy allowed both random testing and testing based on reasonable suspicion "at any time." *Id.* at—, 122 S.Ct. at 2563.

The students challenging the policy argued that testing should at least require a minimal level of individualized suspicion, but the Court cited *Von Raab* and *Skinner* to reach a contrary conclusion. *Id.* at—, 122 S.Ct. at 2564. As in both of those cases, the Court cited the compelling need to

detect " 'latent or hidden conditions, or to prevent their development,' " so that searches could take place without any indicia of individualized *284 **315 suspicion or probable cause. *Id.* (quoting *Von Raab*, 489 U.S. at 668, 109 S.Ct. 1384).

In evaluating the degree of intrusion on privacy, the students' privacy interests were deemed diminished, as were the interests of workers in closely regulated industries, by the public school district's custodial role and by the students' compliance with additional rules governing participation in extracurricular activities. *Id.* at—, 122 S.Ct. at 2565-66. Also, the character of the intrusion was termed negligible because students could produce a urine sample in a closed bathroom stall while a faculty monitor waited outside, and despite claims that test results were not carefully guarded, the school did not either give results to police or use results to impose discipline. *Id.* at—, 122 S.Ct. at 2566-67. Similarly, in *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386, the Court found the privacy invasion minor because the students giving urine samples, who remained fully clothed and not subject to direct observation by the monitor, encountered conditions much like those in public restrooms. The samples were tested only for specified drugs and did not reveal any other information; test results were disclosed to a limited group of persons and were not given to police.

On the other side of the scale, the Court accepted as well-known the health and safety risks of drug use and added that "it would make little sense" to require that a problem be allowed to develop before the school district could seek to prevent it. *Id.* at—, 122 S.Ct. at 2568. *See also Von Raab*, 489 U.S. at 675 n. 3, 109 S.Ct. 1384 (when government aims to deter "highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the [testing] scheme . . . , is more logically viewed as a hallmark of success"). The Court also noted that some teachers had

reported seeing students who appeared to be under the influence of drugs at school. *Id.* at—, 122 S.Ct. at 2567. It concluded that in light of a "nationwide epidemic of drug use," neither "a particularized or pervasive drug problem," *id.* at—, 122 S.Ct. at 2568 (emphasis added), nor individualized suspicion was necessary to support random drug testing.

In fact, the Court warned that requiring individualized suspicion might have unintended consequences such as targeting unpopular groups or causing the district, out of fear of litigation over whether the suspicion was justified in a particular case, to less vigorously enforce the testing and so lose its benefits. *Id.* 2559 at—, 122 S.Ct. at 2568-69. The Court further held that, "[i]n any case, this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means." *Id.* at—, 122 S.Ct. at 2569 (emphasis added). The testing was "a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use." *Id.*

The four dissenting justices in Earls objected not to the lack of individualized suspicion so much as to the perversity of testing arguably those "least likely to be at risk from illicit drugs." *Id.* at—, 122 S.Ct. at 2572 (Ginsburg, J., dissenting). The dissent also contended that the balance of the school district's interests against the students' privacy interests was improperly struck when the nature of student participation in choir, band, or academic team, as contrasted with participation in athletics, did not necessarily reduce the students' privacy expectations, and no documented drug problem bolstered the need for testing. *Id.* at—, 122 S.Ct. at 2574-75. Justice Ginsburg distinguished *Skinner* and *Von Raab* because testing in those cases sought to avoid enormous health and safety risks to others; she distinguished *Vernonia* because physical exertion by drug-using athletes created serious risk

of injury to the athletes and to other players. *Id.* at—, 122 S.Ct. at 2575-76.

Here, as in *Skinner* and *Von Raab*, the testing is imposed on individuals who have substantially reduced expectations of privacy because they work in a highly regulated occupation, and if impaired, place themselves, co-workers, and the public at grave risk. Thus, we disagree with the dissent's suggestion that firefighters' rights to privacy are only slightly diminished compared to those of other adults. Moreover, we see little ground to distinguish approval of a school district's random drug testing to detect and deter illegal drug use by student athletes *(Vernonia)* or by students engaged in after school activities (Earls) from the City's random drug testing of firefighters to detect and deter illegal drug use.

The dissent characterizes the City's interest in testing its firefighters as merely "symbolic" and suggests without elaboration that the risks to public safety that the City seeks to avoid through its testing program are not "substantial and real." The dissent notes that employees in a number of other positions identified as "safety sensitive" are subject to testing. However, testing of firefighters is the sole issue here, and our colleague seriously underestimates the rigorous nature of firefighters' duties and the potential harm that impaired firefighters might inflict. Thus, we do not doubt that the City's interest in ensuring that its firefighters are in optimum condition is compelling. Firefighters must be mentally alert at all times in order to instantly respond to a crisis and grasp and follow orders, particularly when a split-second decision or error in judgment may prove fatal; they also must be physically fit in order to perform under the extremely demanding and dangerous conditions that jeopardize their own lives, the lives of their co-workers, and the lives and property of the public. Furthermore, even off-duty drug or alcohol consumption may imperil safety interests if firefighters can be recalled to duty in an emergency. Given the

daunting responsibilities they must shoulder on a moment's notice, firefighters expect, and necessarily accede to, more governmental regulation than most workers. Because the trust placed in them is so great, the need to detect a firefighter who is impaired at work is equally great.

Additionally, although the firefighters' communal working environment reduces their expectations of privacy and engenders camaraderie and a certain esprit de corps, that camaraderie may make testing dependent on individualized suspicion less effective or less likely to occur. As Justice Breyer reiterated in his concurring opinion in Earls, testing based on individualized suspicion, while seemingly more reasonable, might instead result in use of "subjective criteria" to identify who will be tested or in stigmatizing those actually selected. 536 U.S. at—, 122 S.Ct. at 2571 (Breyer, J., concurring). In *Vernonia*, the Court noted that the athletes' parents found random testing less objectionable than suspicion-based testing because the latter "transform[ed] the process into a badge of shame." 515 U.S. at 663, 115 S.Ct. 2386.

Other courts faced with constitutional challenges to drug testing programs have upheld random and/or suspicionless testing of firefighters and those who occupy safety-sensitive positions. In *Doe v. City and County of Honolulu*, 8 Haw.App. 571, 816 P.2d 306, 310-11 (1991), for example, a firefighter challenged a suspicionless drug testing program. After citing *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C.Cir.1989),[7] the court stated that random testing should not be analyzed differently than the pre-transfer or pre-promotion testing in *Von Raab* or the post-accident testing in *Skinner*. *Id.* at 314. The court considered the public safety as

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[7] In *Harmon*, the court found no constitutional violation in random testing of government employees holding top secret national security clearances. 878 F.2d at 496.

well as the firefighters' "health, safety and job performance" to find that testing served a special need. *Id.* It also found the firefighters' privacy expectations diminished by the giving of blood and urine during annual physicals, by regulation of their off-duty conduct, and by their need for strength, stamina, judgment, and alertness on the job. *Id.* at 314-15. The court finally rejected a claim that less intrusive means could detect drug use or impairment, citing *Skinner*, 489 U.S. at 629 n. 9, 109 S.Ct. 1402 (possibility of a less intrusive means of conducting a search is not the touchstone) and concluded that a compelling interest in safety outweighed the minimal intrusion on privacy. *Id.* at 316.

Many federal and state courts have similarly found employee drug testing programs constitutional. *See Hatley v. Dep't of the Navy*, 164 F.3d 602, 603-04 (Fed.Cir.1998) (random drug testing of firefighter working on military base); *Aubrey v. Sch. Bd. of Lafayette Parish*, 148 F.3d 559, 563-65 (5th Cir.1998)(suspicionless and random testing of school custodians when no general drug problem existed); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir.1998) (suspicionless but not random drug testing of teaching applicants without any documented workplace drug problem); *Wilcher v. City of Wilmington*, 139 F.3d 366, 373- 78 (3rd Cir.1998) (random drug testing of firefighters that required direct supervision of urine collection); *Saavedra v. Albuquerque*, 73 F.3d 1525, 1532 (10th Cir.1996) (reasonable suspicion-based testing of City's firefighters); *Bluestein v. Skinner*, 908 F.2d 451, 456-57 (9th Cir.1990) (random nature of testing of airline personnel is relevant to reasonableness of program but also may be more effective deterrent and does not render testing unreasonable); *Nat'l Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 610-13 (D.C.Cir.1989) (suspicionless random testing of civilians employed by military in aviation and police functions); *Policemen's Benev. Ass'n of New Jersey v. Washington Township*, 850 F.2d 133, 141 (3rd Cir.1988) (suspicionless

random drug testing of police officers); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 566-67 (8th Cir.1988) (suspicionless random testing of nuclear power plant engineers). But *see Anchorage Police Dep't*, 24 P.3d at 557-58 (relying on state constitution to approve post-accident or event-related testing of police officers but finding random testing creates " 'fear and surprise' " and that, without extant drug problem, privacy interests outweigh government's less immediate need); *Guiney v. Police Comm'r of Boston*, 411 Mass. 328, 582 N.E.2d 523, 525-26 (1991) (relying on state law to strike down random drug testing of police officers because no drug problem existed); *Beattie v. City of St. Petersburg Beach*, 733 F.Supp. 1455, 1458-59 (M.D.Fla. 1990) (city's safety interest not sufficiently compelling to test all firefighters for drug use, without any individualized suspicion, during annual physicals when no drug problem had been documented).

If firefighters must be ever-vigilant, we think the City can be no less vigilant in detecting impaired firefighters and removing them from the workforce. Therefore, we conclude that the City's interests are sufficiently compelling to permit random testing.

CONCLUSION

After balancing Petersen's reduced expectations of privacy against the City's compelling need to discover specific but hidden conditions representing grave risks to the health and safety of the firefighters and the public, we hold that the random testing component of the Policy is reasonable under both Article 2, Section 8 of the Arizona Constitution and the Fourth Amendment of the United States Constitution. We reverse the trial court's grant of summary judgment, vacate the injunction, and remand for entry of summary judgment for the City.

CONCURRING: *JOHN C. GEMMILL*, Judge.

HALL, Judge, concurring in part and dissenting in part.

I agree with my colleagues that the Arizona Constitution affords no greater protection against drug testing than does the Fourth Amendment. *State v. Juarez*, 203 Ariz. 441, 444, ¶ 14, 55 P.3d 784, 787 (App.2002). Thus, I concur in section B of the majority opinion. I believe, however, that the City's public safety interest in requiring firefighters to submit to random, unannounced, and suspicionless drug testing does not outweigh Petersen's Fourth Amendment "right to be let alone--the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Therefore, I respectfully dissent from the majority's holding that the City-compelled collection and testing of urine and breath is constitutionally reasonable.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment safeguards the privacy, dignity, and security of persons against certain arbitrary and invasive acts by state officers, *Skinner*, 489 U.S. at 613-14, 109 S.Ct. 1402, even when the government is acting in its capacity as an employer, *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (plurality opinion). *See* also *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

Because state-compelled collection and testing of urine "intrudes upon expectations of privacy that society has long recognized as reasonable," *Skinner*, 489 U.S. at 617-18, 109

S.Ct. 1402, such intrusions are "searches" under the Fourth Amendment:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Id. (quoting *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir.1987), aff'd in part, vacated in part, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)).[8] Not all governmental searches are proscribed by the Fourth Amendment, only those that are unreasonable. *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402. Reasonableness "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id.* (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985)).

The reasonableness of a particular search is determined, as my colleagues correctly state, by "balanc[ing] the degree of the intrusion on individual privacy against the extent to which the intrusion promotes legitimate governmental interests." Ante ¶ 15 (citing *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402). Although the majority states the standard accurately, it then misapplies the standard by according too little significance to the degree to which random, unannounced, and suspicionless drug testing infringes on a person's bodily integrity and human dignity and by characterizing the Policy as meeting a "compelling" safety need in the complete absence of any facts demonstrating any actual problem that would justify

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[8] Likewise, subjecting a person to the compelled production of alveolar or "deep lung" breath "implicates [ ] concerns about bodily integrity" and is deemed a search. *Skinner*, 489 U.S. at 617, 109 S.Ct. 1402.

dispensing with the "right of the people to be secure in their persons." U.S. Const. amend. IV.

Skinner does not support the imposition of a random, unannounced, and suspicionless drug-testing regimen for firefighters. First, as acknowledged by the majority, the testing at issue in *Skinner* was not random. Instead, a railroad employee, in the absence of any individualized suspicion, could only be tested if the employee was involved in a "triggering event" such as a train accident or incident, or a safety-rule violation. 489 U.S. at 609-11, 109 S.Ct. 1402. Second, the government's interest in combating the documented incidence of drug and alcohol use by railroad employees presented "special needs" that overrode the right of a citizen to be protected against arbitrary governmental intrusions on his or her privacy and justified dispensing with the warrant requirement or need for individualized suspicion. *Id.* at 620, 109 S.Ct. 1402. The Court believed that a warrant, which assures a citizen subject to its reach that any intrusion on privacy is "narrowly limited in its objective and scope," was unnecessary because "the circumstances justifying toxicological testing and the permissible limits of such intrusions [were] defined narrowly" in the policy. *Id.* at 622, 109 S.Ct. 1402. Further, "the delay necessary to procure a warrant [might] result in the destruction of valuable evidence" pertaining to an accident, incident, or rule violation. *Id.* at 622-23, 109 S.Ct. 1402.[9]

In contrast, the City's Policy, which compels firefighters to submit to random testing without advance notice, requires no

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[9] Justice O'Connor, who joined in the opinion, later described *Skinner* as being based "on the firm understanding that a requirement of individualized suspicion for testing train operators for drug or alcohol impairment following serious train accidents would be unworkable because 'the scene of a serious rail accident is chaotic.' " *Vernonia*, 515 U.S. at 674-75, 115 S.Ct. 2386 (O'Connor, J., dissenting) (quoting *Skinner*, 489 U.S. at 631, 109 S.Ct. 1402).

" justifying" triggering event. Although the City's goals of both discerning and deterring drug use are laudable, it can hardly be claimed that these ends justify the means of dispensing with the warrant requirement or the need for reasonable suspicion in the absence of any triggering event, the immediacy of which in *Skinner* made it constitutionally "reasonable" to conduct drug testing without a warrant or reasonable suspicion that the particular employee was impaired. *Id.* at 631, 109 S.Ct. 1402.

Likewise, *Von Raab* provides only limited support for the majority's conclusion that the Policy will not violate the Fourth Amendment's reasonableness requirement. As in *Skinner*, the drug tests performed on Customs employees in *Von Raab* were not random. Instead, only employees that had been accepted for promotion or transfer to one of three categories of covered positions were tested.[10] *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384. The Court identified several factors that it believed were sufficiently compelling to justify conducting suspicionless testing of employees who applied for promotion to positions directly involving the interdiction of illegal drugs or requiring the incumbent to carry a firearm:[11] (1) "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population[,]" i.e., the "smuggling of illicit narcotics[,]" (2) the exposure of Customs employees to drug traffickers and the controlled substances they seek to smuggle into the country create corresponding problems involving the safety and integrity of the employees, (3) the irreparable damage to the "national interest in self-protection"

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[10] The covered positions were those that met one or more of three criteria: (1) direct involvement in drug interdiction or enforcement of related laws, (2) carrying a firearm, and (3) handling classified material. *Von Raab*, 489 U.S. at 660-61, 678, 109 S.Ct. 1384.

[11] The Court remanded the case to determine whether the third category was reasonably limited in scope. *Id.* at 678, 109 S.Ct. 1384.

if drug users were not barred from positions involving the interdiction of illegal drugs, and (4) the public interest "demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm[.]" *Id.* at 668- 70, 109 S.Ct. 1384 (internal quotations omitted). In concluding that the government's compelling interest in waging the drug war and safeguarding our borders outweighed the privacy interests of the affected Customs employees, the Court emphasized that the requirement that employees be notified in advance of the scheduled sample collection reduced to a minimum any "unsettling show of authority" that may be associated with an unannounced intrusion on privacy, *id.* at 672 n. 2, 109 S.Ct. 1384 (quoting *Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)), and "contribute[d] significantly to diminish the program's intrusion on privacy[,]" *id.* at 676 n. 4, 109 S.Ct. 1384.

In comparison, the City's Policy, which requires all firefighters to submit to random and unannounced testing, is both broader and more intrusive than the drug-screening program upheld in *Von Raab*. The majority's interpretation of *Von Raab*, ante ¶ 21, as "justify[ing] searches *'without any measure of individualized suspicion'* "whenever the government's purpose is to discover or deter drug use by employees, effectively enables the City to bootstrap its desire to combat a nonexistent drug problem into a "compelling" justification that trumps the legitimate privacy rights of its employees. *Compare Beattie*, 733 F.Supp. at 1458 (holding that drug testing of firefighters unjustified "[w]ithout some form of individualized suspicion or some compelling reason beyond a hypothetical future problem"). As stated in *Skinner*, the requirement of individualized suspicion may be jettisoned only in limited circumstances:

> [W]here the privacy interests implicated by the search are minimal, and where an important governmental

> interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

489 U.S. at 624, 109 S.Ct. 1402. More recently, in *Chandler v. Miller*, 520 U.S. 305, 309, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), the Court characterized the narrow exception from the usual individualized suspicion requirement as a "closely guarded category of constitutionally permissible suspicionless searches."

Unlike the majority, I do not believe the City's symbolic need to portray its employees as being drug-free is the type of "special need" that justifies dispensing with traditional Fourth Amendment safeguards. Even if the special-needs exception presents as low of a hurdle as the City apparently believes,[12] the blanket suspicionless searches at issue here are not reasonable means to protect society in the absence of any showing that public safety is actually in jeopardy. The majority's observation that firefighters, "if impaired, place themselves, co-workers, and the public at grave risk[,]" *ante* ¶ 28, while accurate, is equally true of anyone who operates a motor vehicle on a public roadway while under the influence of intoxicants.

The majority also relies on the United States Supreme Court decisions in *Vernonia* and *Earls*, both of which addressed the constitutionality of suspicionless drug testing of students in public schools. Neither of these cases substantially supports the constitutionality of the City's Policy. In *Vernonia*, the Supreme Court upheld a school district's suspicionless drug testing of student athletes. 515 U.S. at 665, 115 S.Ct. 2386. In *Earls*, the Court, relying on *Vernonia*,

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[12] Among the positions identified by the City as safety-sensitive in the Policy are meter reader, paint striper, tire service worker, and customer service representative.

upheld a drug-testing policy that required all students who participated in any extracurricular activity to submit to drug testing. 536 U.S. at —, 122 S.Ct. at 2562. In both cases, the Court repeatedly emphasized the unique nature of the public school environment, where the Fourth Amendment is interpreted more leniently with respect to searches. *Earls*, 536 U.S. at—, 122 S.Ct. at 2565 ("Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.") (quoting *Vernonia*, 515 U.S. at 656, 115 S.Ct. 2386); *id.* ("Central . . . is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.") (quoting Vernonia, 515 U.S. at 654, 115 S.Ct. 2386); *id.* ("[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.") (quoting *Vernonia*, 515 U.S. at 665, 115 S.Ct. 2386). Obviously, unlike a public school student, a firefighter's right to privacy, although limited in some respects, is not inherently "subject[ ] to greater controls than those appropriate for adults." *Id.*

Unlike my colleagues, I have little trouble distinguishing the mandatory drug testing of students involved in extra-curricular activities from the drug testing of firefighters pursuant to the Policy. The school districts in both *Vernonia* and *Earls* adopted their testing regimes in the face of a documented drug problem within their districts and against the background of a nationwide drug epidemic afflicting our children that "makes the war against drugs a pressing concern in every school." Earls, 536 U.S. at—, 122 S.Ct. at 2567. Further, even though a history of pervasive drug use is not a prerequisite for the institution of suspicionless drug testing, such evidence, which is lacking here, "shore[s] up" the need for a government drug-testing program. *Id.* at—, 122 S.Ct. at 2567-68 (quoting Chandler, 520 U.S. at 319, 117 S.Ct. 1295).

The majority's reliance on *Earls* is particularly problematic given that Justice Breyer, who joined in the 5-4 decision, wrote a separate concurrence emphasizing his reliance on the nondisciplinary nature of the testing program, which "preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school." *Id.* at—, 122 S.Ct. at 2571. In contrast, pursuant to the City's Policy, a firefighter who refuses to provide a urine sample on demand is automatically terminated.[13]

Instead, I find persuasive the analysis in Anchorage Police Department, which involved an almost identical testing program to the one at issue here. In that case, the Supreme Court of Alaska held that the portion of the municipality's substance abuse testing policy that required police and fire department employees to submit to random and unannounced testing violated the Alaska Constitution. 24 P.3d at 558. Applying the special-needs balancing test as articulated by

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[13] Other cases cited by the majority are distinguishable because they: (1) do not address random drug testing, *e.g., Wilcher*, 139 F.3d at 374 (firefighters consented to random drug testing in bargaining agreement with city); *Saavedra*, 73 F.3d at 1532 (testing of firefighters based on reasonable suspicion); Doe, 816 P.2d at 310 (urine routinely collected from firefighters and tested as part of their annual physical); (2) fail to conduct a careful analysis of the competing private and public interests, *e.g., Hatley*, 164 F.3d at 604 (summarily upholding random drug testing of firefighters); (3) interpret Supreme Court precedent in this area in a more limited manner than does the majority, *e.g., Harmon*, 878 F.2d at 490 *("Von Raab* [ ] suggests that the government may search its employees only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation."); or (4) uphold suspicionless searches conducted in response to risks to public safety that are substantial and real, *e.g., Cheney*, 884 F.2d at 610-12 (suspicionless random testing of civilians employed by military in aviation and police functions); *Rushton*, 844 F.2d at 567 (engineers at nuclear power plants); *see also United States v. Edwards*, 498 F.2d 496, 500 (2d Cir.1974) (search of passengers and baggage before boarding commercial airliners).

the United States Supreme Court, the court first upheld the superior court's finding that the municipality's interest in ensuring public safety outweighed the privacy intrusion that occurs when the employees are subjected to suspicionless urine testing for job-related events, such as application for employment, promotion, demotion, transfer, or after a vehicular accident. *Id.* at 556-57. However, the court then concluded that the balance shifted in favor of individual privacy rights in the case of an indefinite requirement of random testing. *Id.* at 557.

In determining that the municipality failed to establish a special need for the random-testing component of its policy, the court cited three considerations. *Id.* First, the municipality's random testing, which the court described as "a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time[,]" placed increased demands on employees' reasonable expectations of privacy. *Id.* at 557-58. Second, unannounced random testing is more intrusive and has a broader reach than testing triggered by predictable, job-related occurrences such as promotion or transfer. *Id.* at 558. Third, because random testing has no nexus to any job-related occurrence, it reduces the immediacy of the government's need for suspicionless testing:

> [I]n the absence of a documented history of substance abuse, then, the Municipality can claim no immediate, job-contextual need to know the results of a randomly drawn urinalysis; it can only claim a more attenuated institutional interest in checking.

Id. These same privacy considerations are magnified in the context of the City's Policy, which requires that any "conscientious objector" be terminated from employment.

In summary, the majority's conclusion that the City's interests are sufficiently compelling to justify imposition of its random, unannounced, and suspicionless drug testing

program is not supported by the relevant United States Supreme Court cases. Moreover, its application of the "special-needs" rationale to dispense with any requirement of particularized suspicion, even though there is no evidence in the record of any past or ongoing drug problem among the City's firefighters, goes too far in eroding the Fourth Amendment protections enjoyed by all citizens. *See Camara*, 387 U.S. at 530, 87 S.Ct. 1727 ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."). Instead, I conclude that the City's asserted special need to deter drug abuse, the incidence of which is hypothetical, does not outweigh Petersen's right to be let alone absent individualized suspicion. Therefore, I would uphold the trial court's grant of summary judgment and affirm its order enjoining the City from implementing the random, suspicionless part of its Policy.

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

[Filed 11–01–2001]

CV 2001-0902.8

CRAIG W. PETERSEN

v.

CITY OF MESA

MINUTE ENTRY

HONORABLE ROBERT D. MYERS

This matter has been under advisement.

Plaintiff is a firefighter employed by the City of Mesa Fire Department. Plaintiff has filed a complaint for declaratory and injunctive relief, alleging that the random, suspicionless drug and alcohol testing provisions of the City of Mesa Fire Department's proposed Alcohol and Controlled Substance Testing Policy and Procedures ("Policy") would violate his rights under the United States and Arizona Constitutions.[1] Specifically, Plaintiff has requested that the Court declare that drug and alcohol testing without a warrant based upon probable cause, or without reasonable suspicion, that Plaintiff

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[1] Plaintiff has not challenged the provisions of the Policy that provide for drug and alcohol testing based upon reasonable suspicion, following an accident, following a return to duty or as a follow-up component after a previous misuse of alcohol or a controlled substance.

has engaged in the use of illegal drugs or violated the City's policy regarding use of alcohol violates:

> 1. Plaintiff's privacy rights as guaranteed by Article II, Section 8 of the Arizona Constitution;
>
> 2. Plaintiff's right to be free from unreasonable searches and seizures as guaranteed by Article II, Section 4 of the Arizona Constitution;
>
> 3. Plaintiff's right to be free from unreasonable searches and seizures as guaranteed by Article II, Section 4 of the Arizona Constitution;
>
> 4, Plaintiff's privacy rights as guaranteed by the United States Constitution;
>
> 5. Plaintiff's procedural and substantive due process rights as guaranteed by the Arizona and United States Constitutions.[2]

Plaintiff has also requested that the Court permanently enjoin the Defendant from testing without a warrant based upon probable cause, or without reasonable suspicion, that Plaintiff has engaged in the use of illegal drugs or violated the City's policy regarding use of alcohol.

The Defendant's answer affirmatively alleged that the position of firefighter is a safety sensitive position, that random drug testing is reasonable under Fourth Amendment, and that Plaintiff had no likelihood of prevailing on the merits, Defendant asked that the Court deny Plaintiff's request for an injunction and dismiss the complaint for failure to state a claim.

Plaintiff subsequently filed an application for a preliminary injunction prohibiting Defendant from implementing the random suspicionless drug and alcohol testing element of the

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[2] Although he has not requested relief on this basis, Plaintiff also alleges that testing without reasonable suspicion violates the Fourth Amendment to the United States Constitution.

Policy until final judgment of the Court is rendered on the Policy's constitutionality.

Defendant has filed a response to Plaintiff's application for a preliminary injunction. The Defendant has moved that the Plaintiff's request for a preliminary injunction be denied and the case be dismissed for failure to state a claim upon which relief can be granted, pursuant to Arizona Rules of Civil Procedure, Rule 12(b).

A motion to dismiss for failure to state a claim admits the truth of facts alleged for purposes of the motion, and argues that a plaintiff is not entitled to relief under any legal theory. *State v. Superior Court of Maricopa County,* 123 Ariz. 324, 329, 599 P.2d 777, 782 (1979). A motion to dismiss for failure to state a claim should be denied unless it appears beyond doubt that no set of facts in support of the claim can be proved that would entitle a plaintiff to relief. *Newman v. Maricopa County*, 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App. 1991).

Plaintiff and Defendant have filed their responses and replies. In support of its motion to dismiss, Defendant states that the facts are undisputed and that as a matter of law, Plaintiff's arguments are entirely without merit. Defendant has submitted the U.S. Department of Transportation's Controlled Substances and Alcohol Use and Testing regulations as Exhibit 2 to its response to Plaintiff's application for a preliminary injunction. Plaintiff has submitted an unsworn statement, referred to as an affidavit, from a Kent Holtorf, M.D., as Attachment 1 to his response to the motion to dismiss. Oral argument on Defendant's motion was heard on September 28, 2001. The Court will treat this matter as a motion for and response to motion for summary judgment.

Defendant argues that suspicionless and random drug and alcohol testing of employees serving in safety sensitive positions is lawful, and that firefighters by the nature of their

work clearly serve in safety sensitive positions. Defendant states that the Policy's random testing element has as its goal the protection and welfare of the community. To that end, random testing is intended to deter prohibited drug and alcohol use and to remove identified users from the "safety sensitive work force." Defendant relies primarily on two U.S. Supreme Court decisions upholding suspicionless drug and alcohol testing programs for certain public sector employees in safety sensitive positions, *Skinner v. Railway Labor Executives' Assn*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and a series of federal court decisions following *Skinner* and *Von Raab*.

Plaintiff argues that the Policy violates his right to privacy in that it: 1) mandates an embarrassing and undignified situation; 2) requires the employee to make available highly personal and private information beyond that necessary to test for impairment; 3) subjects employees to false accusations based on false positive tests. Plaintiff contends that Defendant has failed to demonstrate a drug abuse problem in the City of Mesa Fire Department, or any other real or substantial threat to public safety sufficiently compelling to justify the use of random testing. In addition to *Skinner* and *Von Raab*, Plaintiff relies upon *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), and *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), arguing that the latter two decisions limit the reach of *Skinner* and *Von* Raab. Plaintiff also relies upon *Anchorage Police Department Employees Association* v. *Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001), which held that random suspicionless drug and alcohol testing of municipal police and fire fighters violated the Alaska Constitution's privacy and search and seizure provisions.

1. Drug and Alcohol Testing Constitutes a Search and Seizure.

It is clear, and neither party disputes, that urine, blood or other testing of a public employee pursuant to a drug and alcohol testing policy and separate from the government's general interest in law enforcement constitutes a search and seizure. "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617. "In view of our holding in Railway Labor Executives that urine tests are searches, it follows that the Customs Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665. Arizona appellate courts have not had occasion to compare the application of either Fourth Amendment or Article 2, § 8 of the Arizona Constitution to government drug and alcohol testing policies. However, in the context of Article 2, 5 8 and the search of a home, the Arizona Supreme Court has stated that Arizona's constitutional provisions were both generally intended to incorporate federal protections and specifically in creating a right of privacy. *State v, Ault*, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986). The Court of Appeals has held that subjecting the sister of an adjudicated juvenile delinquent to urinalysis testing involved a significant intrusion on her right to be free from unreasonable search and seizure under the Fourth Amendment and Article 2, Section 8. *Katherine S. v. Foreman ex* rel. *County of Maricopa*, 197 Ariz. 371, 379, 4 P,3d 426, 434 (App,1999). The Court of Appeals has also found warrantless administrative searches in the context of a closely regulated business to implicate rights to privacy and freedom from unreasonable search and seizure. *State v. Hone*, 177 Ariz. 213, 866 P.2d 881 (App.1993).

Other state courts that have considered challenges of suspicionless drug and alcohol testing of public employees under their own state constitutional provisions have also found the testing to be an intrusion on employees' privacy and dignity, and to constitute a search and seizure. *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001); *Doe v. City of Honolulu*, 8 Haw. App. 571, 816 P.2d 306 (1991) ; *Guiney v. Police Commissioner of Boston,* 411 Mass. 328, 582 N. E. 2d 523 (1991); *Robinson* v. *City of Seattle*, 102 Wash. App. 795, 10 P.3d 452 (Wash. Ct. App. 2000). These courts, whether considering state constitutional privacy or search and seizure provisions, have analyzed the testing in terms of the reasonableness of the warrantless search and seizure.

2. Arizona Constitution, Article 2, § 8.

Arizona courts have held that Article 2, § 8 is broader and more explicit than the Fourth Amendment in safeguarding the fundamental liberty of Arizona citizens. *State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986); *State v. Tykwinski*, 170 Ariz. 365, 371, 824 P.2d 761, 767 (App. 1991). While both parties argue generally that some level of balancing of Plaintiff's privacy interests and Defendant's interest in intruding upon his privacy, neither party's pleadings address the requirements of Article 2, § 8. Since Arizona courts have not considered the application of either the Fourth Amendment or Article 2, § 8 to drug and alcohol testing of public employees, and neither party has identified a standard to be applied in this case, the Court must determine the standard to be applied.

Arizona courts have recognized that a warrant, probable cause, or individualized suspicion is not always necessary for a search or seizure to be reasonable. Arizona courts have permitted warrantless administrative searches in the context of a closely regulated business where there was a substantial government interest in the regulatory scheme pursuant to

which the inspection was made, and where privacy interests were therefore lessened; the warrantless inspections were necessary to further the regulatory scheme; and the regulatory scheme had a properly defined scope and limited the discretion of the inspecting officers. *State v. Hone*, 177 Ariz. 213, 215, 866 P.2d 881, 883 (App. 1993).Arizona courts have also upheld warrantless, suspicionless roadblock traffic stops as reasonable under the Fourth Amendment and Article 2, § 8 where the gravity of the public concern for safety and deterrence was compelling, the seizure effectively advanced the public interest and there was no less intrusive alternative, and the severity of the interference with individual liberty was minimal. *State v. Superior Court (Simmons)*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-77 (1984); *see State v. Tykwinski*, 170 Ariz. 365, 824 P.2d 761 (App. 1991).

In *Anchorage Police Department Employees Association v, Municipality of Anchorage,* 24 P.3d 547 (Alaska 2001), the Alaska Supreme Court reviewed a challenge by police and fire fighter employee associations to the Municipality of Anchorage's drug and alcohol testing program, which provided for suspicionless testing, on the grounds that the policy violated the Alaska Constitution. Alaska's Constitution has a both a privacy provision and a search and seizure provision, and thus differs from Arizona's.[3] However, the Anchorage court stated that the two provisions together provide greater protection than the Fourth Amendment, as is true for Arizona cases construing the Arizona Constitution's

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[3] "Article I, section 14, of the Alaska Constitution prohibits unreasonable searches and seizures: 'The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.' Article I, section 22, defines Alaska's right to privacy; 'The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.'" *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001).

privacy provision. The Anchorage court analyzed the issue in search and seizure terms, stating that if the policy satisfied that state constitutional provision, the privacy provision would also be satisfied, and adopted the special needs analysis employed by the U.S. Supreme Court decisions in *Skinner*, *Von Raab*, *Vernonia*, and *Chandler*, *supra*. In adopting a special needs analysis, both Anchorage, as to state court decisions, and *Skinner* and *Von Raab*, as to Supreme Court Fourth Amendment cases, relied in part on precedents balancing privacy interests and government intrusion on such interests in the areas of administrative searches and roadblock traffic stops. Given the prior Arizona decisions in these areas, as specified above, the Court finds the *Anchorage* court's case-by-case special needs balancing analysis persuasive.

The Anchorage Court found that drug and alcohol testing of public employees meets a special government need where employment occurs in a highly regulated, safety-essential field in which employees necessarily expect reduced privacy in job-related activities and implicitly agree to a diminished level of privacy when they accept employment. The Court found that police and fire fighters clearly hold safety-sensitive positions in extensively regulated fields of activity in which they would reasonably expect that their conditions of employment would subject them to exceptionally close scrutiny. Finally, the Court examined the nature of the privacy interest involved, the nature, extent and efficacy of the intrusion, and whether the government's interest was compelling. Under that analysis, the Court found that as to the random, suspicionless component of the municipality's policy, random testing placed greater demands on employees' reasonable expectations of privacy, was qualitatively more intrusive and had a broader reach than testing triggered by predictable, job-related occurrences, and, particularly in the absence of a documented history of substance abuse within the affected departments, had no logical nexus to any job-

related occurrence and thus reduced the immediacy of the government's need for the information disclosed.

Plaintiff has argued that the Defendant's policy mandates an embarrassing and undignified situation, requires the employee to make available highly personal and private information beyond that necessary to test for impairment, and subjects employees to false accusations based on false positive tests. Defendant argues that drug testing has become common in the workplace, citing one law review article, that testing programs for public employees in safety sensitive positions are invariably upheld in the courts, and that fire fighters work in safety sensitive positions in a close, regimented environment; cites the U.S. Department of Transportation's Controlled Substances and Alcohol Use and Testing regulations; and cites A.R.S. § 23-493 *et seq*. as to the state's policy regarding drug testing in the private workplace.

There is no doubt that fire fighters hold safety-sensitive positions in an extensively regulated field of activity. As a result, fire fighters may reasonably expect that the conditions of their employment would subject them to closer scrutiny than would be required of the general government workforce. However, as the Anchorage case makes clear, neither a finding of reduced privacy interest, nor a minimal, narrowly tailored intrusion on such interest, nor a compelling government interest-and therefore the reasonableness of random drug and alcohol testing-naturally and necessarily follow. It is also instructive that the U.S. Supreme Court has upheld random, suspicionless testing under the Fourth Amendment only in the special environment of schools, for student athletes. While other Courts have, under other constitutional provisions and differing factual circumstances, upheld suspicionless testing triggered by predictable job-related occurrences and by random procedures, Courts have also examined whether procedures for testing would be reasonably effective for discovering impairment or whether the tests as performed

were too broad in scope or frequency, or not narrowly tailored so as to constitute an undue invasion of privacy. *Anchorage Police Department Employees Association* v. *Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001) 7 *see Gonzalez v. Metropolitan Transportation Authority*, 174 F.3d 1016 (9th Cir. 1999). Courts have recognized the dangers of false positive test results with testing populations for which no prior history or incidence of drug or alcohol use is shown, or for which any existing drug or alcohol use is low. *Gonzalez v. Metropolitan Transportation Authority*, 174 F.3d 1016, 1023 (9th Cir. 1999). Courts have required a *showing* whether a policy's low threshold (.02) for a positive alcohol test result calls into question the constitutionality of that portion of the test.

Knox County Educ. Assign v. Knox County Bd. of Educ., 158 F.3d 361, 384 (6th Cir. 1998). *Given the* forgoing analysis, the holding in Anchorage, and Defendant's showing, not only *can it* not be said that Plaintiff is without any reasonable prospect of prevailing on the merits of his case, Defendant has failed to sustain its burden of showing a compelling interest for its intrusion on Plaintiff's reasonable expectations of privacy.

The Court finds that there are no material facts at issue, and that the random, suspicionless drug and alcohol testing component of Defendant's Policy violates Article 2, § 8 of the Arizona Constitution. Defendant's motion, treated here as one for summary judgment, is denied. Plaintiff's requested relief that the Court declare that random, suspicionless drug and alcohol testing violates Plaintiff's privacy rights as guaranteed by Article II, Section 8 of the Arizona Constitution is granted. The Court finds that Plaintiff would, as a result, suffer irreparable harm if tested pursuant to the random, suspicionless component of the Policy, and that such harm outweighs any harm to the Defendant. Plaintiff's requested relief that the Court permanently enjoin the

Defendant from enforcing the random, suspicionless component of its Policy is therefore granted. The remainder of the Policy is unaffected by this ruling. The Court has signed this order to give finality to its judgment, for appellate purposes.

Dated this 29th day of October 2001.

/s/ROBERT D. MAYERS
ROBERT D. MYERS
JUDGE OF THE SUPERIOR COURT

(3)

No. 03-1599

Supreme Court, U.S.
FILED
JUN 2 8 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The "Question Presented" by Petititoner is wrong. It does not reflect the actual holding and reasoning of the Arizona Supreme Court. Petitioner therefore submits that the correct "Question Presented" is as follows:

> Did the Arizona Supreme Court correctly hold that the Fourth Amendment to the United States Constitution prohibits a city from imposing a random, suspicionless, warrantless drug testing program on its firefighters in the absence of any history or even rumor of drug abuse, and in the absence of the most immediate and compelling need, based on a clearly articulated, real and identifiable danger?

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INTRODUCTION

It may sound odd, but in many ways, it would be great for this Court to grant the Petition for Writ of Certiorari. First, this case represents an opportunity for this Court specifically to approve the Arizona Supreme Court's sound reasoning and solid result. Second, this case could serve as the foundation for a comprehensive opinion by this Court that will bring coherence and rationality to an unsettled area of constitutional law. Despite having written several Fourth Amendment opinions dealing with warrantless, suspicionless urinalysis testing programs, this Court has *still* not developed a widely-accepted, reliable and fair way to resolve such cases. The excellent dissents in several of this Court's urinalysis cases make that point very well, as do the remarkably divergent opinions of the lower courts, which are clearly struggling to interpret this Court's teachings – and are too often degrading the Fourth Amendment in the process.

The facts in the present case are as simple as any that have come before this Court in decades. The City of Mesa imposed a random, warrantless, suspicionless urinalysis program on an exemplary fire department with no history of drug abuse and no history of any drug-related incidents, injuries or accidents. The Arizona Supreme Court invalidated this random, suspicionless, warrantless drug testing program, in large part because the random, unexpected nature of this search and seizure program tipped the balance in favor of the firefighters' Fourth Amendment freedom from unreasonable governmental search and seizure. Simply stated, these firefighters are respected, adult professionals entitled to respect and privacy. If there was ever a case to draw a constitutional line on what the government can do – and cannot do – when it wants to seize and search the bodily

fluids of its adult, and presumptively innocent citizen-employees, this is the case.

The Arizona Supreme Court did well with this hard issue, although it would have been magnificent if it had gone even further in condemning this latest manifestation of the contemporary government penchant for using technology to invade the bodily privacy of those citizens who are also public employees. Privacy is far too easily lost, and, once lost, is seldom regained. However, as Justice Louis Brandeis (1856-1941) wrote in a prior time of national fear and hysteria:

> The makers of our Constitution . . . conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 436, 478 (1928) (Brandeis, J., dissenting). Perhaps this case will help stem the rising tide of overzealous lower court cases threatening to demolish the right of privacy and dismantle the Fourth Amendment.

I. THE ARIZONA SUPREME COURT'S DECISION SETS A RATIONAL CONSTITUTIONAL STANDARD

The City of Mesa inexplicably contends there is "a consistent constitutional standard among the states and federal circuits" on the issue of random drug testing.

However, several eloquent lower court judicial opinions have expressly held that the warrantless, suspicionless urinalysis testing of municipal firefighters violates the Fourth Amendment's prohibition against unreasonable search and seizure. *See, e.g., Beattie v. City of St. Petersburg Beach*, 733 F. Supp. 1455, 1458 (M.D. Fla. 1990) ("The City's generalized fear that a drug problem will arise at some future time, without more, is insufficient to overcome even the lessened privacy interests of the fire fighters in this case.") and *Johnson v. City of Plainfield*, 731 F. Supp. 689, 690-91 (D.N.J. 1990) (City's "surprise urinalysis test" of its firefighters so violated their rights that it "should cause us to pause in the nationwide rush toward massive and mandatory drug testing."). Thus, in fact, among the lower courts there is no *consistent* constitutional standard in this area.

It is true that the Arizona Supreme Court's opinion directly conflicts with numerous opinions by federal circuit and federal district courts, and with some decisions by state appellate courts. That is an excellent reason to accept review of this matter, since what the Arizona Supreme Court has written is so radically different from the result one would expect from almost all other lower courts. Having said that, it is also true that the Arizona Supreme Court's opinion supports the Fourth Amendment and is in full harmony with the relevant opinions of the one Court that has the final say in the definitive interpretation of the United States Constitution – this Court. The Arizona Supreme Court's opinion shines so brilliantly precisely because its adherence to the fundamental values of the Fourth Amendment is now a rare jewel in the drug testing area.

Further, the Arizona Supreme Court's approach makes sense: A city cannot rationally impose a random, suspicionless, warrantless urinalysis testing program on its fire department if there is no history of drug abuse in that fire department. After all, why have such an intrusive program if there is no problem? The factor tipping the balance in favor of the privacy rights of the firefighters is the "random" aspect of the testing program, which imposes a tangible element of fear and apprehension (reminiscent of the apprehension and fear caused by the hated "general warrants" the British Empire used against its American colonists). The Arizona Supreme Court's approach is fair and reasonable. It balances the privacy rights of the firefighters against an utterly theoretical risk that a firefighter might possibly use an illegal drug that might cause on-the-job impairment at some unknowable future date, maybe.

Instead of accepting the Arizona Supreme Court's straightforward, consistent constitutional standard, the City of Mesa proposes jurisprudence by syllogism. The City of Mesa's underlying syllogism is this: (1) A firefighter occupies a "safety sensitive" position. (2) Any person in a "safety sensitive" position can be forced to submit to random, suspicionless, warrantless urinalysis testing. (3) Therefore, any City of Mesa firefighter can be forced to submit to random, suspicionless, warrantless urinalysis testing whenever the City of Mesa demands. The City of Mesa's sweeping syllogism fractures in light of this Court's drug testing opinions.

A. "Safety Sensitive" in the Context of Drug Testing.

In the context of subjecting adult government employees to urinalysis and drug testing with no warrant and no

individualized suspicion of drug abuse, this Court has only applied the "safety sensitive" analysis in two situations: (1) in the drug-law enforcement area, and (2) in the course of post-accident investigations. However, the City of Mesa's vision of the "safety sensitive" designation is so elastic that, with any imagination, it will encompass almost any employee. In fact, many lower courts have indiscriminately distorted the "safety sensitive" rubric, twisted it around "special needs" terminology, and transformed it into justification for testing the following persons, among others:

Airport mechanics. *Boesche v. Raleigh-Durham Airport Authority*, 432 S.E.2d 137 (N.C. App. 1993).

Construction and maintenance workers. *Smith v. Fresno Irrigation District*, 84 Cal. Rptr. 2d 775 (App. 1999).

Motor vehicle operators. *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989).

Race horse jockeys. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991).

School janitors. *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998).

School teachers. *Crager v. Board of Education of Knott County, Kentucky*, 313 F. Supp. 2d 690 (E.D. Ky. 2004).

Shuttle bus drivers. *National Treasury Employees Union v. Yeuttner*, 918 F.2d 968 (D.C. Cir. 1990).

Truck drivers. *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991).

So far, this elastic list stretches from jockeys to janitors, with governmental inventiveness and judicial acquiescence the only limits to including all employees of every description. After all, if anyone actually or even potentially operating a motor vehicle is already included, not too many people are being left out. For instance, take a librarian stacking books on high shelves in the public library. If the books are shelved inexpertly, or a high ladder is used ineptly, heavy objects could plummet from on high, strike another employee or a library patron, and cause grievous harm. As our imaginations readily inform us, the "safety-sensitive" analysis is so malleable that it will consume the rule against warrantless searches – a rule embedded in the United States Constitution.

Indeed, things have gotten so out of control that a federal district court in Kentucky could recently blithely proclaim that: "There is no general Fourth Amendment prohibition against suspicionless and random drug testing." *Crager*, 313 F. Supp. 2d at 693. That pronouncement turns the United States Constitution upside down, because there is a clear prohibition in the Fourth Amendment against any warrantless government search and seizure made without probable cause ***and*** because this Court has ***never*** stated that suspicionless and random drug testing was per se valid and permissible under the Fourth Amendment. On the contrary,

this Court specifically held, *in a urinalysis case*, that the Fourth Amendment is a "general prohibition against nonconsensual, warrantless, and suspicionless searches." *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001).

The astounding expansiveness and lackadaisical attitude displayed by the lower federal and state courts in this area started with a misunderstanding of the "safety sensitive" designation, which this Court first applied in the urinalysis and drug testing context in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). However, the U.S. Custom Service's drug testing program in *Von Raab* was "designed to prevent the promotion of drug users to sensitive positions as much as it [was] designed to detect those employees who use drugs." *Id.* at 674. This was not a "random" testing procedure: it only covered those employees who applied for promotion to positions involving interdiction of illegal drugs, requiring them to carry firearms or to handle classified materials.

In *Von Raab*, the term "sensitive" referred to higher-level, supervisory positions within the U.S. Customs Service, an agency charged with stopping the importation of illegal drugs into our nation. The testing targeted "Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty." *Id.* at 672. Because such employees – unlike "government employees in general" – were "employees involved in drug interdiction," it made sense to test them for illegal use of the drugs they were in direct contact with and which they were tasked with interdicting. *Id.*

In short, the "safety sensitive" analysis in *Von Raab* concerned a truly exceptional class of law enforcement

employees. As this Court emphasized, it was "readily apparent that the Government has a compelling interest in ensuring that front-line [drug] interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. Very few other government employees, including the City of Mesa's firefighters, are armed "front-line [drug] interdiction personnel." It is a distortion of *Von Raab* to argue that firefighters occupy "safety sensitive positions," in the unique sense that *Von Raab* uses that specialized term.

Firefighters are not armed agents interdicting the importation of illegal drugs. Firefighters operate in a different environment entirely. Their work involves safety, but so do a host of other government jobs, from janitors waxing floors to clerks driving motor vehicles in heavy traffic to librarians stacking heavy books. Unlike customs enforcers, firefighters are not "often exposed to [the drug-smuggling] criminal element and to the controlled substances it seeks to smuggle into the country." *Id.* at 669. In the *Von Raab* sense, "safety" is clearly not the same as "safety sensitive." A general concern for "safety" alone does not justify random, suspicionless drug testing.

The dissents in *Von Raab* came from the intriguing combination of Justices Marshall, Scalia, Brennan and Stevens. In their brief dissent, Justices Brennan and Marshall observed that the "Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on probable cause is unprincipled and unjustifiable." *Id.* at 679-80. Justice Scalia's dissent, in which Justice Stevens joined, and with which Justice Marshall agreed, is one of the most eloquent statements of personal liberty in American legal history. It is the shame of the world that America's lower courts have apparently so seldom seen it.

Justice Scalia started with the unassailable premise that urinalysis testing is a Fourth Amendment "search particularly destructive of privacy and offensive to personal dignity." *Id.* at 680. For the first time, Justice Scalia wrote, this Court had sanctioned, with no warrant or individualized suspicion, a distasteful intrusion into the privacy of apparently law-abiding citizens. "Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment." *Id.* Because the facts in *Von Raab* demonstrated no actual or even likely "frequency of use nor connection to harm," the government's testing program was simply "a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 681. Since the City of Mesa admits that there is no rumor of drug use, much less a history of drug use, its program is also merely a symbolic gesture designed to win public favor at the expense of the privacy rights of the firefighters and of the Fourth Amendment.

A generalized suspicion of wrongdoing that might theoretically be avoided by random urinalysis drug testing would reduce the Fourth Amendment to a "frail protection." *Id.* at 684. There was a real potential for overly-broad application of the majority's approach. Indeed, as Justice Scalia predicted, many lower courts are already inclined to approve random drug testing of practically all other government workers "whose work, if performed under the influence of drugs, may endanger others – automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards." *Id.* at 685. The next lurch down the slippery slope will naturally be to require random "similar testing of private citizens who use

dangerous instruments such as guns or cars, or who have access to classified information." *Id.* at 686. The price for a symbolic gesture is simply too great, as the City of Mesa's conduct shows once more:

> Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us – who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

Id. at 687.

In short, the *Von Raab* case, as Justices Marshall, Scalia, Brennan and Stevens all cautioned, must be applied in a very restrictive manner. Having said that, there is one more limited sense in which this Court has used the term "safety sensitive" in relation to warrantless and suspicionless public employee drug testing. On the same day that *Von Raab* was decided, this Court also upheld the propriety of post-railway accident, mandatory urinalysis drug testing in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). In that case, this Court found that post-railway accident testing was proper for railway employees doing "safety-sensitive tasks" such as those "engaged in handling orders concerning train movements, operating crews, and those engaged in the maintenance and repair of signal systems." *Id.* at 620.

Significantly, nowhere does *Skinner* sanction pre-accident, random, warrantless, suspicionless testing. The accident itself provides the suspicion and removes any randomness from the drug testing, which is tied to a specific event. The meaning of the term "safety-sensitive" in *Skinner* therefore cannot be divorced from its context, which is limited to post-accident scenarios. Indeed, in the present case, Respondent is not challenging the right of the City of Mesa to test firefighters after a work accident. That's fine. The *Skinner* approach to "safety sensitive" is thus not even an issue in this case.

However, no discussion of *Skinner* is complete without mentioning the astoundingly prescient dissent that Justices Marshall and Brennan wrote in an effort to limit the damage done by the majority opinion's assault on the Fourth Amendment. Both Justices were concerned that, as happened with the City of Mesa, the desire to combat a perceived present evil would erode the fundamental privacy rights of innocent citizens. Their words can scarcely be improved:

> Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, and the Red Scare and the McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

Skinner, 489 U.S. at 635 (citations omitted).

The "mass toxicological testing of persons who have given no indication whatsoever of impairment," which is precisely what the City of Mesa wants to do, "ignores the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges." *Id.* at 635-36. "The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens." *Id.* at 636. This justified criticism of the *Skinner* majority opinion applies with far greater force to the City of Mesa's random, suspicionless testing program, which is not based in any way on any event generating any conceivable level of suspicion, such as an accident.

The penultimate paragraph of the dissent in *Skinner* is an extended and particularly apt quotation of a perceptive passage written by one of our finest American jurists, Justice Oliver Wendell Holmes, Jr. (1841-1935):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904).

The present case is a chance to make reasonable law – not great law. This Court has, in highly limited circumstances, made statements that lower courts have misconstrued as permission to dismantle the Fourth Amendment. Instead of protecting the privacy rights of public employees, lower courts have often held that the government may require random, suspicionless urinalysis testing of any government worker whose job involves "safety." That was not something that even the majority opinions in *Von Raab* or *Skinner* would contemplate.

It is time for this Court to clarify that the Fourth Amendment is still a bar against random searches as pernicious as the arbitrary "general warrants" that the minions of George III (1738-1820) inflicted on his American colonists.

> General warrants, known as writs of assistance in colonial America, granted officers of the English Crown blanket authorization to search wherever they pleased for goods imported in violation of British tax laws. [*Stanford v. Texas*, 379 U.S. 476, 481 (1965).] The Supreme Court explained that, "They were denounced by James Otis [1725-1783] as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.'" *Id.*

United States v. Bridges, 344 F.3d 1010, 1014 n.1 (9th Cir. 2003). Indeed, it is "familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated

the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980).

"For most of our constitutional history," therefore, "mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 667 (1995) (O'Connor, J. dissenting). Were George III alive today, and in his right mind for once, he would surely be amused and astounded at the spectacle of the descendants of his presumptuous, liberty-loving American colonists officiously imposing general warrants on their fellow citizens.

B. The Lack of any History – or Even Rumor – of Drug Abuse.

The record in this case proves there is not even a hint of a rumor of any drug abuse by members of the Mesa Fire Department, much less any history of such an unfortunate problem. Although they may not have been entirely accurate or wise, the majority opinions in *Von Raab* and *Skinner* were based on the premise that there was a concrete, identifiable problem that needed to be addressed and corrected by the suspicionless, warrantless extraction and testing of bodily fluids. The present case is an instance where the complete lack of any history of drug misuse will not support circumvention of the Fourth Amendment.

Naturally, in a case such as this, there is no "special need" to invade the privacy rights of the firefighters and conduct compelled extraction and testing of their personal bodily fluids. Sadly, in the lower courts' "surreal world of special needs, any fact can be twisted to fit the desired result without regard for Fourth Amendment mainstays." George M. Dery

III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 Ariz. L. Rev. 73 (Spring 1998). American lower courts have repeatedly found "special needs" justifying random, warrantless, suspicionless urinalysis testing, despite the lack of any foundation for such searches and seizures in this Court's jurisprudence. Indeed, since "the federal courts have entered upon the enterprise of balancing the privacy of workers against the 'need' for testing, more and more citizens have become subject to the escorted trip to the bathroom." *International Brotherhood of Electrical Workers, Local 1245 v. U.S. Nuclear Regulatory Commission*, 966 F.2d 521, 527 (9th Cir. 1992) (Fernandez, C.J., concurring).

In point of fact, there are ***only two cases*** in which this Court has upheld the ***random***, compelled extraction and testing of bodily fluids, and ***both*** of those cases involved the amazingly restricted constitutional and privacy rights of high school students, persons with a recognized unique status in the laws and traditions of our nation. "From the earliest days of the common law, public school students have lacked fundamental rights, even the right of liberty in its narrowest sense." James M. McCray, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 Vand. L. Rev. 387, 388 (2000).

In the first such random urinalysis case, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), this Court sanctioned the testing of high school students participating in interscholastic athletics. In the second case, *Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), this

Court upheld the random urinalysis testing of high school students participating in competitive extracurricular activities. At the heart of both cases, the "special need" of fighting ***documented*** drug abuse among minor children entrusted to the care of the government was held strong enough to infringe on these children's already almost non-existent protections against search and seizure while on school grounds or engaged in school activities. Concisely stated, "Fourth Amendment rights . . . are different in public schools than elsewhere." *Vernonia*, 515 U.S. at 656. "In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing." *Earls*, 536 U.S. at 830.

That does not mean that *Earls* or *Vernonia* were necessarily correctly decided. After all, as Justice O'Connor reminded us in her sterling dissent in *Earls*, because our schools "are educating the young for citizenship," that is "reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Earls*, 536 U.S. at 855 (O'Connor, J., dissenting) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)). *Vernonia* and *Earls* did not, unfortunately, provide scrupulous protection of American students' constitutional freedoms.

However, even in the drug-testing cases involving minor students, this Court was careful to explain that there was no general or overall relaxation of Fourth Amendment privacy rights in other areas: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Vernonia,* 515 U.S. at 665.

Here, of course, the context is a fire department with no hint or history of drug abuse, staffed by respected, honored and superbly-trained professionals. School children may expect to be imposed upon by their schools almost as much as they are imposed upon by their parents. That is a part of their unique status. It is one of the great benefits, and one of the most uncomfortable drawbacks – from the minor's immature and limited perspective – of being a minor.

A case that dramatically supports the Arizona Supreme Court's approach to random, suspicionless, warrantless drug testing is *Chandler v. Miller*, 520 U.S. 305 (1997). In that case, the Georgia Legislature passed a law requiring candidates for certain state offices to certify that they had taken a urinalysis drug test within thirty days before qualifying for nomination or election and that the test result was negative. A jaded view of recent American political history might suggest that political candidates would be a group where random drug testing could yield some surprisingly positive results, depending on how one defines the word "positive." However, this Court was not even slightly amused at the startling prospect of suspicionless drug testing of political candidates. Writing the strong 8-1 majority opinion, Justice Ginsburg soundly condemned the Georgia scheme.

As in our case, in *Chandler* there was ***no*** "record of drug abuse by" the persons that the government wanted to subject to warrantless and suspicionless searches. *Id.* at 311. Justice Ginsburg started her analysis by noting that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion." *Id.* at 308. While she recognized that there was some "limited circumstances" where a search

might be conducted without individualized suspicion, the Georgia scheme did "not fit within the closely guarded category of constitutionally permissible suspicionless searches." *Id.* Justice Ginsburg acknowledged that the urine collection and testing program, although conducted in a polite manner moderately respectful of the privacy of those being tested, constituted a search under the Fourth Amendment. The question, then, was the reasonableness of the search.

Ordinarily, according to Justice Ginsburg, a search is only reasonable under the Fourth Amendment if it is "based on individualized suspicion of wrongdoing." *Id.* at 313. However, in a few instances "special needs" – other than the detection of crime – might justify failure to follow the Fourth Amendment. In such cases, "courts undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314. However, even when conducting such a balancing test, "the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. In *Chandler*, however – as in the case of the City of Mesa's firefighters – there was no "indication of a concrete danger demanding departure from the Fourth Amendment's main rule," and nothing in the record even hinting that the "hazards" that the government had broadly described were "real and not simply hypothetical." *Id.* at 319.

While a "demonstrated problem of drug abuse" might not be needed to support "the testing regime" in all cases, it would certainly "shore up as assertion of a special need for a suspicionless general search program. Proof of unlawful drug use may help to clarify – and to substantiate – the precise

hazards posed by such use." *Id.* at 319. However, a suspicionless, symbolic testing program that largely seeks "to set a good example" by testing public officials is insufficient to overcome the Fourth Amendment's protections. *Id.* at 321-22.

Significantly, in her analysis, Justice Ginsburg quoted momentous passages from the passionate 1928 *Olmstead* dissent of Justice Louis Brandeis (1856-1941):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . [I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Chandler, 520 U.S. at 322 (quoting *United States v. Olmstead*, 277 U.S. 438, 479, 485 (1928) (Brandeis, J., dissenting)).

"However well meant," as Justice Ginsburg wrote, the drug testing system imposed by the government in *Chandler*, diminished "personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action." *Chandler*, 520 U.S. at 322. Of course, "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk" could be reasonable, as "for example, searches now routine at airports and at

entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id.* at 323.

Here, public safety in Mesa, Arizona is not "genuinely in jeopardy," nor is there any "substantial and real" risk to public safety that would justify "blanket suspicionless searches" like those imposed at airports and some public buildings. On the contrary, the only real and substantial risk here is trampling on the privacy rights and liberty interests of the City of Mesa's firefighters.

It is fair to read *Chandler* as imposing strict limitations on the ability of the government to require random, suspicionless, warrantless drug testing of adults. Chief Justice Rehnquist, the sole dissenter in *Chandler*, certainly appears to have thought that *Chandler* was far too restrictive on the government. According to the Chief Justice, if "in fact preventing persons who use illegal drugs from concealing that fact from the public is a legitimate government interest," then prior cases such as *Von Raab* and *Skinner*, "indicate that the government may require a drug test." *Chandler*, 520 U.S. at 326. In his penultimate sentence, Chief Justice Rehnquist concludes: "Nothing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court." *Id.* at 328. In the present case, the City of Mesa's drug testing program is as misguided and as far out of constitutional bounds as the State of Georgia's program in *Chandler*.

As an afterword on the history of drug abuse problem, the City of Mesa argues that the Arizona Supreme Court's

approach is unworkable, because there is no way to determine what sort of "history" of drug abuse is adequate to support random, suspicionless, warrantless drug testing. This contention is poorly taken for at least two reasons. First, it is a given in the present case that there is no rumor or hint of drug abuse. Those are the facts we have to work with. Establishing a workable and just constitutional standard here is therefore not hard under the present uncluttered facts. Second, asking how much drug abuse is enough to permit random, suspicionless, warrantless drug testing is as profitable as asking "How high is up?" This particular issue necessarily will have to be resolved on a case-by-case basis – and this is not such a case.

C. The Fear and Uncertainty Inherent in Random Testing.

Of course, the heavy feather that tipped the scales of justice in favor of finding that the City of Mesa's random, suspicionless and warrantless urinalysis drug testing program was a violation of the Fourth Amendment was the fear and apprehension that such a program creates. It is the equivalent of the "knock on the door in the middle of the night" favored by tyrants throughout history. *See United States v. Smith*, 340 F. Supp. 1023, 1029 (D. Conn. 1972) ("A knock at the door is more alarming in the middle of the night, and it is no less so because the officer knocking has a search warrant.").

This Court has held that, where drug testing is random, and is performed with no advance notice to those being forced to provide samples of their bodily fluids to the government, there is a potential for the "'unsettling show of authority' that may be associated with unexpected intrusions on privacy." *Von Raab*, 489 U.S. at 672 n. 2 (quoting *Delaware*

v. Prouse, 440 U.S. 648, 657 (1979)). After all, a government employee reasonably might "expect not to be subjected to a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time." *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 557 (Alaska 2001). This type of situation presents the sort of "arbitrary and invasive acts by officers of the Government or those acting at their direction" that the Fourth Amendment was enacted to prevent. *Skinner*, 489 U.S. at 613-14.

The Arizona Supreme Court concluded that the "very nature of random, suspicionless searches precludes any advance notification and subjects employees to continuous government scrutiny." *Petersen v. City of Mesa*, 207 Ariz. 35, 43, 83 P.3d 35, 43 (2004). The extra element of fear and uncertainty inherent in such a random drug testing program, coupled with the expectations of privacy enjoyed by every American citizen, and the lack of any rumor, hint or history of drug abuse in this fire department, were enough to convince the Arizona Supreme Court that the random drug testing program was crafted and imposed in violation of the Fourth Amendment.

II. THERE IS NO CONFLICT WITH FEDERAL LAWS AND RULES.

The Arizona Supreme Court's decision does not conflict with any of the several federal statutes, rules and regulations that purportedly require the City of Mesa to perform random, suspicionless, warrantless drug testing of certain specified classes of municipal employees. Such employees include such seemingly innocuous workers as solid waste equipment operators, street and park maintenance personnel, and certain

mechanics. It is true that the case before the Arizona Supreme Court only concerned municipal firefighters, who are not yet victims of the federal government's apparently expanding crusade to test every public employee in America. However, if the dauntless federal crusade to force more and more of our citizens to submit to such tests continues, the testing program will eventually encompass every human being in our nation.

The City of Mesa's argument that it is federally required to conduct random, warrantless, suspicionless testing of certain of its employees – but that it cannot conduct such freewheeling, unbridled testing of the city firefighters – misses the point. After all, as a theoretical matter since the ratification of the United States Constitution – and as a practical matter since 1865 – federal law governs state law, controlling even the Arizona Supreme Court. That is, there is no longer any nullification doctrine.

If the federal government chooses to pass laws and create regulations mandating unconstitutional drug testing, no state supreme court can nullify that pernicious practice. Naturally, the City of Mesa can, and should, strive to protect the rights and privacy of its employees by challenging all such insidious laws and regulations *in federal court*. If the City of Mesa has decided simply to abandon the privacy rights of its employees and to decline to challenge such matters in federal court, it can hardly cite to that ignoble decision as a reason to ignore the Arizona Supreme Court's determination to invalidate a random drug testing scheme that is patently unconstitutional.

Indeed, based upon the number of cities and organizations that have stated their intent to file amicus curiae

briefs, there is considerable fear and concern on their part that this Court will both heartily approve the reasoning of the Arizona Supreme Court and apply that reasoning to all government employers throughout the nation. That would indeed be a way to allay the City of Mesa's worry that it has to test some of its municipal employees but not firefighters – namely, cease federally-mandated testing of all of the City of Mesa's employees. Depending on the breadth of this Court's treatment of this case, that is a result that is certainly both proper and attainable.

III. THIS COURT SHOULD BROADLY APPLY THE ARIZONA SUPREME COURT'S OPINION.

Drug abuse is terrible. If alcohol is included as a drug, this is a problem that our nation has actively confronted and fought, with varying levels of enthusiasm and success, for well over a century. (The Prohibition Era is a good example of zeal and failure, for that matter.) However, the apparently endless fight against drug abuse is not an invitation or occasion to invade the privacy and liberty rights of apparently law-abiding citizens, or to create any exclusion to the Fourth Amendment's protections. "There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest." *Skinner*, 489 U.S. at 641 (Marshall, J., dissenting).

The simple fact is that protection of constitutional rights is always costly. Every time an assuredly guilty criminal suspect is released because of a violation of constitutional rights, society pays a price. Every time vicious opinions and filthy images are disseminated in public, society pays a price. Every time the government pays fair market value

compensation to condemn critically needed property, society pays a price. That is the inevitable cost of a Constitution that, unlike many constitutions around the world, actually and actively guarantees certain rights to the people of the United States of America. Indeed, the Fourth Amendment itself imposes a cost, since it bars the government from conducting general, warrantless searches whenever it seems expedient. Fortunately for our republic, "the Fourth Amendment is the keystone that holds up the arch of our Bill of Rights which in turn is the unique contribution of our founding fathers to [a] system of government [that] has now survived longer than any other representative government in the world." *United States v. Gould*, 364 F.3d 578, 605 (5th Cir. 2004) (DeMoss, C.J., dissenting).

It may be that the Arizona Supreme Court's opinion will ultimately serve as the basis for striking down other laws, rules and regulations forcing the random, suspicionless, warrantless testing of government employees and other persons in the City of Mesa, in Arizona and across the United States. That is not something to fear. On the contrary, it is a result devoutly to be wished. Indeed, "perhaps no greater public interest exists than protecting a citizen's rights under the constitution." *Legal Aid Soc. of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402, 1419 (D. Hawaii 1997). The Arizona Supreme Court has, as it has traditionally done, served that public interest very well.

CONCLUSION

For the foregoing reasons, Respondent respectfully recommends that this Court grant the Petition for Writ of Certiorari, for the purpose of affirming the Arizona Supreme Court's opinion and crafting an opinion by this Court that

will restrict the ability of the City of Mesa, and any other American government, from imposing random, suspicionless, warrantless drug testing programs in the absence of any history of drug abuse, and in the absence of an immediate and compelling need based on a clearly articulated, real and identifiable danger.

This Court's opinions on random, suspicionless drug testing have been so misconstrued by many lower courts that "special needs" and "safety sensitive" have come to mean "test whomever you want, whenever you want." This case is a chance to rein in those federal and state courts, and to clarify the limits that the Fourth Amendment places on warrantless, random and suspicionless drug testing of adult public employees.

In the event that this Court does not want to address these issues now, no recommendation on what to do is really needed, other than that the Court then should deny the Petition for Writ of Certiorari and remand this matter for further proceedings in the courts of the State of Arizona.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

REPLY TO BRIEF IN OPPOSITION

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IN THE

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CITY OF MESA,

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REPLY TO BRIEF IN OPPOSITION

Respondent concedes that "[i]t is true that the Arizona Supreme Court's opinion directly conflicts with numerous opinions by federal circuit and federal district courts, and with some decisions by state appellate courts." (Brief in Opposition ("Opp.") 3.) He further concedes that the court's opinion is "radically different from the result one would expect from almost all other lower courts." (*Id.*) Respondent requests this Court grant the Petition in order to bring "coherence and rationality to an unsettled area of constitutional law." (*Id.* at 1.)

While Respondent first claims that this case involves an unsettled area of constitutional law (*Id*), he subsequently claims that this case is in "full harmony" with this Court's "definitive interpretation" of these issues (*Id.* at 3). Respondent's concept of "full harmony," however, rests upon his

assertion that the profession of firefighting is no more safety sensitive than "librarians stacking heavy books" or "janitors waxing floors." (*Id.* at 8.) And this "full harmony" is premised on snippets from the "dissents in several of this Court's urinalysis cases." (*Id.* at 1.) The Arizona Supreme Court's decision, in actuality, is in dissonance with principles established by this Court and in direct conflict with numerous district court decisions. The Brief in Opposition (a misnomer since it supports the granting of the Petition) attempts to justify the Arizona Supreme Court's decision by ignoring the court's newly created balancing test and by focusing on fragments from dissenting opinions of this Court.

I. *CHANDLER V. MILLER* DOES NOT CONTROL THIS CASE.

Respondent adopts the position that firefighters' duties involve the same type of safety issues as shelving books and waxing floors in an attempt to make it appear as if the Arizona Supreme Court's decision is in "full harmony" with this Court's decision in *Chandler v. Miller*, 520 U.S. 305 (1997). No such harmony exists. In *Chandler*, this Court applied the special needs balancing test to a Georgia law requiring drug testing—within a specified time period before qualifying for a ballot—of candidates for state offices. Unlike the professions where this Court has upheld drug testing—*National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (customs agents) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railroad employees)—*Chandler* involved political candidates that "typically do not perform high-risk, safety-sensitive tasks." 520 U.S. at 321-22. And, as this Court observed, the conduct of political candidates seeking to be put on a ballot does not genuinely place the public safety in jeopardy. *Id.* at 323.

Respondent's position that the firefighting profession is no more safety sensitive than menial tasks performed by

custodians and librarians is unsupported by any case law cited by him and is contrary to case law he relies on. For example, the Brief in Opposition cites with approval *Anchorage Police Department Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001), but fails to observe that this court found "[f]ire [f]ighters undeniably hold safety-sensitive positions." *Id.* at 555. Even the Arizona Supreme Court's opinion does not support Respondent on this issue. The court's decision (1) cites with approval the Alaskan decision that found the profession to be safety sensitive, (Pet. App. 15a.); (2) implicitly acknowledges the profession is safety sensitive, (*Id.* at 7a.); and, (3) describes the profession as safety sensitive (*Id.* at 12a.). Other courts have found the profession to be so safety sensitive that it provided a "compelling interest" to allow testing. *See, e.g., Hatley v. Department of Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998); *see also Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) ("Chattanooga has a compelling interest in ensuring that the duties of fire fighters . . . are performed free of any risk of impairment by the use of illegal drugs").

Here, unlike *Chandler*, the profession of firefighting exemplifies safety-sensitive tasks: firefighters operate large emergency vehicles at high speeds; have access to and administer numerous types of life-saving drugs;[1] administer invasive medical treatment, such as emergency endotrachael intubation, I.V. administration, and cricothyrotomies; provide life-saving medical support, such as CPR, defibrillation, cardiac monitoring, and advanced life support for trauma and drowning victims; respond to bomb threats, building collapses, and hazardous material spills; respond to drug

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[1] Mesa's fire department maintains and administers the following drugs: adenosine, albuterol, atropine, calcium chloride, diazepam, dopamine, epinephrine, etomidate, ipratropium, lasix, lidocaine, magnesium sulfate, methylprednisolone, narcan, nitroglycerin, oxytocin, sodium bicarbonate, sodium succinate, succinolcholine, verapamil, and versed.

overdose and suicide calls; investigate arson scenes; provide assistance in combating forest fires; respond to and defend large fires in other states; and respond to burning buildings in their own municipalities to rescue victims and protect property.

Respondent equates the profession of firefighting to librarians stacking books and custodians waxing floors so as to make the profession appear more like politicians seeking a state office and somehow significantly different than duties performed by customs agents (*Von Raab*) and train engineers (*Skinner*). For it is only in Respondent's world where the safety issues in shelving books equates to driving a speeding fire truck, administering life-saving drugs, performing emergency cricothyrotomies, etc., that the Arizona Supreme Court's opinion harmonizes with this Court's precedent. In *Chandler*, this Court appropriately applied the special needs balancing test to a profession[2] that typically does not involve safety-sensitive tasks. But, here, the Arizona Supreme Court created its own test for a profession that epitomizes safety sensitive. The decision conflicts with principles established by this Court; and, as acknowledged by Respondent, it "directly conflicts with numerous opinions by federal circuit and federal district courts." (Opp. 3.)

II. THE ARIZONA SUPREME COURT CREATED NEW PREREQUISITES TO THE SPECIAL NEEDS BALANCING TEST IN CONFLICT WITH THIS COURT.

According to the Arizona Supreme Court (Pet. App. 8a) and the Brief in Opposition (pp. 4, 20-21) there is no risk, danger, or public safety issue until there is documented drug abuse resulting in accidents or injuries. In so concluding, the

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[2] The term profession is used loosely to describe politicians seeking to be put on a ballot.

court created new prerequisites to the special needs balancing test that must be satisfied before a sufficient governmental interest to test can be found: (1) there must be documented drug abuse (Pet. App. 8a); (2) there must be "accidents, fatalities, injuries or property damage" for there to be a "real and substantial risk" (*Id*); and, (3) there must be documentation of drug abuse within the specific department seeking to implement the drug testing policy (*Id*). This newly created balancing test with prerequisites is contrary to principles established by this Court, and it will create inequitable results.

First, this Court has rejected the prerequisite of having to show documented evidence of a drug problem in order to establish a sufficient governmental interest to test. *Von Raab*, 489 U.S. at 673-75.

Second, the Arizona Supreme Court's decision and the Brief in Opposition fail to make the following distinction, which this Court has made: When there is no drug abuse evidence concerning a profession that is fraught with potential risks and dangers to the public, there still may be a real and substantial risk to the public and a "compelling interest in ensuring that . . . [these] employees do not use drugs." *Von Raab*, 489 U.S. at 674. But when the profession does not involve "high-risk, safety-sensitive tasks" and there is no "indication of a concrete danger"—such as being a political candidate seeking to be on a ballot—there is no compelling interest and no special need to test. *Chandler*, 520 U.S. at 319, 321-22. Instead of recognizing this distinction, the Arizona Supreme Court's decision incorrectly equates "compelling interest" and "real and substantial risk" to documented catastrophes caused by drug abuse.

Third, as discussed in the Petition (pp. 17-18) and an Amicus Brief,[3] requiring documented evidence spawns numerous issues as to what is a sufficient quantum of evidence. And even if the initial quantum is met, what occurs after months, years, or decades of a department testing clean?

Fourth, requiring documented evidence makes an individual's Fourth Amendment rights substantially dependent on the conduct of others. In other words, if documented evidence is a prerequisite in determining whether there is a sufficient government interest, the past conduct of other employees (in either taking drugs or not) becomes the focal point as to whether an individual may be randomly drug tested in the future. And, similarly, requiring documented evidence within a specific department makes an individual's Fourth Amendment rights substantially dependent on where the employee works. Firefighters in a fire department with a documented drug history may be subject to random testing, but firefighters in adjacent communities without such a history could not be tested. Unlike the decision here, this Court has not made documented drug abuse a prerequisite to random testing. Rather, this Court has put such evidence in a reasonable perspective by observing that such evidence could "shore up an assertion of special need" and could clarify the "precise hazards posed by such use." *Chandler*, 520 U.S. at 319. By making documented drug abuse a prerequisite, the ultimate measure for the constitutionality of a search is no longer the reasonableness of the search, but rather is substantially (and in some cases totally) dependent on other employees' past conduct and the location of employment.

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[3] Brief of the City of Phoenix, the City of Kingman, the City of Peoria, the City of Prescott, the City of Somerton, the City of Yuma, and the League of Arizona Cities and Towns as *Amici Curiae* in Supporting Petitioner ("Cities' *Amicus* Brief") at 6-8;

Fifth, the Arizona Supreme Court's decision indicates that documented evidence of drug abuse within the specific department being tested is a prerequisite. (Pet. App. 8a.)[4] This Court, however, has not made department specific evidence a prerequisite. For example, in *Skinner*, this Court looked at drug abuse within the "railroad industry," and not at each individual railroad company (or specific departments within each company). 489 U.S. at 607-8. By focusing on the specific department being tested, the Arizona Supreme Court's decision creates a balancing test that is dependent on the size of the department and the level of government legislating the testing requirement. For example, a metropolitan city with a large fire department statistically is more likely to have some documentation of drug abuse due to having more employees. And, similarly, if the testing policy is adopted at the state or federal level, it will encompass more people, which increases the probability that there will be some documented drug abuse. *See, e.g., International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991) (federally mandated testing that would affect three million truck drivers).

There is no disputing that on a county,[5] state,[6] and national[7] level there is documented drug abuse within fire departments. The Arizona Supreme Court's opinion incorrectly makes the special needs balancing test, and the reasonableness of a search, substantially dependent on who institutes the testing (e.g. federal, state, or municipal entity).

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[4] Respondent claims that "the Arizona Supreme Court's approach makes sense: A city cannot rationally impose . . . [random drug testing] if there is no history of drug abuse in that fire department." (Opp. 4.)

[5] Cities' *Amicus* Brief, at 17-18.

[6] Brief of *Amici Curiae* The Drexel Heights Fire District and The Northwest Fire District in Support of Petitioner, at 11,13-14, nn. 5 & 6.

[7] Brief of *Amici Curiae* The International Municipal Lawyers Association and The National League of Cities in Support of Petitioner, at 16-18.

Finally, the Arizona Supreme Court's decision conflicts with federal law requiring municipalities to randomly test certain employees—such as gas pipeline workers, solid waste equipment operators, and fleet mechanics. Respondent casts aside this issue by asserting that a state court cannot review federal legislation. (Opp. 23.) This unsupported assertion is contrary to this Court's statement that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *Asarco Incorporated v. Kadish*, 490 U.S. 605, 617 (1989). Furthermore, Respondent's assertion entirely misses the point that the Arizona Supreme Court's decision calls into question the constitutionality of federal regulations that affect every state and municipality.

The Arizona Supreme Court's decision creates a new (and unworkable) special needs balancing test that is in conflict with this Court's and numerous lower courts' decisions. As stated in the Petition, "[r]eview by this Court is needed to restore a consistent constitutional standard among the states and the federal circuits." (Pet. 6.) The City of Mesa requests that this Court grant the Petition.

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CITY OF MESA,

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v.

CRAIG W. PETERSEN,

Respondent.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY CITY OF MESA

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY CITY OF MESA

Drexel Heights Fire District and Northwest Fire District, political subdivisions and municipal corporations of the State of Arizona, through their Attorney, file this amicus curiae brief in support of Petitioner, City of Mesa. All parties have consented to the filing of this brief on behalf of amicus curiae.[1]

INTEREST OF AMICUS CURIAE

Drexel Heights Fire District and Northwest Fire District are municipal corporations serving large populations in Pima County, Arizona. These municipalities are responsible for protecting the public from employee firefighters who may be under the influence of drugs or alcohol.

This matter requires the Court to assess the contours of the Fourth Amendment's prohibition against suspicionless searches as applied to random drug testing of firefighters. The adjudication of the case before this Court is, therefore, a matter of direct concern to Drexel Heights and Northwest Fire Districts, as well as all other governmental fire protection service providers throughout the country.

[1] Counsel for amicus curiae authored this brief in its entirety. Counsel for a party did not author this brief in whole or in part. No person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is undisputed that states have a substantial interest in ensuring that their firefighters are in optimum condition and will not endanger the public while performing their jobs. It is also undisputed that the Fourth Amendment to the United States Constitution guarantees individuals the right to be free from unreasonable searches and seizures. However, the Arizona Supreme Court erred in holding that random, suspicionless drug testing of firefighters unreasonably infringes upon their Fourth Amendment rights.

The Arizona Supreme Court erred in failing to recognize the profoundly sensitive and dangerous work engaged in by firefighters and in finding that the City needed to demonstrate an existing drug problem in its fire department to justify random drug testing. Several United States Courts of Appeals have ruled upon the issue and held that suspicionless drug testing of firefighters is permissible. In addition, this Court has held that suspicionless drug testing does not violate the Fourth Amendment in analogous contexts. The Supreme Court of Arizona, in this case, has taken an entirely opposite view.

The limitations imposed on states by the Fourth Amendment to the United States Constitution should be no greater in one jurisdiction than in another. All states should be entitled to the same opportunity to deter and detect alcohol and drug use among firefighters within their respective jurisdictions. Because the Supreme Court of Arizona has ruled that the limits imposed by the Fourth Amendment are greater in Arizona than the limits imposed in other jurisdictions, amicus curiae respectfully

request that this Court grant the petition for writ of certiorari in this case.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE NATURE OF A FIREFIGHTER'S WORK POSES SUCH A GREAT RISK TO THE PUBLIC THAT EVEN A SINGLE INSTANCE OF IMPAIRED PERFORMANCE COULD BE DEVASTATING.

There are job categories for which it is simply too risky to await the appearance of signs of impairment. The nature of firefighters' work is such that the potential harm from employee drug use is so great that the threat of even a single instance of impaired performance could be devastating.

Almost every aspect of a firefighter's job poses a substantial risk to the public's safety and welfare. Upon leaving the station house on a call, a firefighter gets behind the wheel of a vehicle weighing up to 30,000 pounds and drives in excess of the speed limit to reach the scene of an emergency. The operator of the vehicle often weaves in and out of traffic and proceeds through red traffic signals. Even a moment of inattention could lead to a potentially fatal collision.

In addition, like other fire service providers, both Drexel Heights and Northwest Fire Districts conduct their own safety inspections and perform routine maintenance on these heavy emergency vehicles. Should a firefighter be impaired while performing these tasks, the results could be deadly.

Once on the scene of a fire, teams of firefighters are led into burning buildings to extinguish the flames and rescue victims. In many cases, people are trapped inside and have only a few minutes to live before their lungs are filled with smoke. Firefighters must locate victims quickly and ensure that they are brought to safety. This requires not only quick, clear judgment, but also unfaltering physical fitness and agility.

Moreover, firefighters do much more than fight fires. The fire service today provides full service emergency response. Firefighters are trained and equipped with protective equipment to respond to every conceivable type of emergency. For example, firefighters are first to arrive at terrorist bomb incidents, building collapses, medical emergencies, vehicle accidents, elevator emergencies, hazardous material spills, high-angle mountain rescues, swift water rescues and natural disasters.

In addition, Northwest Fire District has an agreement with the Pima County SWAT team. These firefighters are specially trained to respond with law enforcement to dangerous crime scenes and serve as first responders for combat type injuries. In this type of response situation, the holding of the Arizona Supreme Court, in this case, creates a situation in which some of the emergency responders are subject to random drug testing and some are not.[2] If firefighters are performing

[2] Members of the Pima County SWAT team are subject to random drug testing; pursuant to the holding of the Arizona Supreme Court in this case, firefighters are not. In addition, Northwest Fire District has an intergovernmental agreement with the Arizona Air National Guard whose employees are subject to random drug testing.

the same safety-sensitive tasks as other government employees who are subject to random testing, there is no rational justification for prohibiting random drug testing of firefighters.

The clarity of judgment a firefighter must exercise in the performance of his or her duties is almost unparalleled. Approximately 70% of the calls a firefighter responds to are medical emergencies. The victims are often suffering from life-threatening injuries. Upon arrival, a firefighter must immediately decide upon a course of action and set up sophisticated heart monitors, defibrillators, and pulse oximeters. If necessary, the firefighter must establish an airway and perform CPR. A firefighter trained as an Emergency Medical Technician may also be required to perform complicated medical procedures such as tracheotomies. Should a firefighter be impaired while performing any of these tasks, serious injury or death is likely to result.

Even a firefighter's non-emergency duties pose a substantial risk to hundreds of lives. Both Drexel Heights and Northwest Fire Districts conduct arson investigations in conjunction with law enforcement. In addition, both districts are responsible for enforcing the Fire Code throughout their respective jurisdictions. Should a firefighter be impaired during Fire Code inspections, a violation may be overlooked, and the result may be an accident causing serious harm to numerous individuals.

At the station, firefighters spend the majority of their day conducting clean-up and maintenance of facilities,

apparatus and equipment.[3] The efficient performance of these duties is just as critical to protecting the public safety as those performed during an emergency. Firefighters continuously perform safety inspections of all vehicles and equipment. Some of their duties include ensuring that oxygen tanks are in proper working condition, fire hoses are rolled correctly, all batteries are fully charged, and all drug boxes are fully stocked. If any one of these tasks is performed negligently due to a firefighter being impaired, the public will suffer during an emergency.[4]

In addition to the inherent safety risks, an impaired firefighter abuses the public's trust. Firefighters have the power and authority to enter a person's private home during an emergency. An impaired firefighter is more likely to abuse this authority.

Finally, firefighters are often the first responders on the scene at vehicle accidents involving DUI and are required to testify in criminal DUI trials. The public safety could be irreparably damaged if those charged with safeguarding it were, because of their own drug or alcohol use, unsympathetic to the prosecution of drug and alcohol offenders.

Therefore, because firefighters occupy a highly safety-sensitive position, random drug testing is both appropriate

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[3] On-duty time is also dedicated to providing public education through tours, school demonstrations, and public classes.

[4] Additionally, firefighters spend on-duty time receiving training regarding the proper use of safety and medical equipment including heart monitors and defibrillators. It is critical to the public safety that firefighters be alert and attentive while learning these techniques.

and consistent with the holdings of this Court. *See National Treasury Union v. Van Raab*, 489 U.S. 656 (1989). Amicus curiae respectfully request that this Court grant certiorari and confirm the constitutionality of random, suspicionless drug testing as applied to firefighters.

II. THE DECISION OF THE SUPREME COURT OF ARIZONA CONCERNING THE SCOPE OF FOURTH AMENDMENT PROTECTIONS DIRECTLY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Although this Court has never considered the reasonableness of random, suspicionless drug testing of firefighters, this Court has upheld the constitutionality of suspicionless drug testing programs in analogous contexts. The decision of the Supreme Court of Arizona is in direct conflict with those holdings. In fact, despite its assertion to the contrary, the Arizona Supreme Court's opinion seems to hold that suspicionless drug testing constitutes a per se violation of the Fourth Amendment. This holding cannot stand in light of recent decisions by this Court.

As recently as 2002, this Court upheld drug testing of middle and high school students who participated in extracurricular activities. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002). The testing policy allowed both random testing and testing based on reasonable suspicion. *Id.* at 826. In upholding the random component of the testing, this Court stated that schools have a compelling need to detect drug use among their students *Id.* at 827. The Court then balanced the schools' interest in detecting drug use against the students' expectations of privacy. *Id.* The balance weighed in favor of the schools, and the Court held random testing to be constitutional.

A. The performance of firefighters' duties depends just as uniquely on their judgment and dexterity as it does for other government employees for whom random drug testing has been held constitutional by this Court.

Even more relevant to the case at bar is this Court's holding in *National Treasury Employees Union v. Van Raab*, 489 U.S. 656 (1989). In *Van Raab*, this Court upheld the suspicionless drug testing of United States Customs Service employees who are directly involved in illegal drug interdiction, and of those who carry a firearm. *Id.* at 679. This Court explained, "Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting searches without any measure of individualized suspicion." *Id.* at 668.

The Arizona Supreme Court declined to follow the holding in *Von Raab* for several reasons, all of which are immaterial. The Arizona Court reasoned that unlike Customs Service employees, firefighters are not directly involved in drug interdiction, do not carry a firearm, and are not required to use deadly force in the regular course of their duties. In addition, the court stated that firefighters' work environment provides a better opportunity for supervisors to detect drug use and develop reasonable suspicion to conduct a test. Finally, the court noted that while the testing in *Von Raab* was suspicionless, it was not random and therefore resulted in a less intrusive privacy invasion than the one at issue in this case. *Petersen v. City of Mesa*, 83 P.3d 35, 40 (Ariz. 2004).

Amicus curiae do not dispute these differences; however, they contend that the holding in *Von Raab* did not rest upon these factors. In upholding the drug testing of Customs Service employees, this Court stated, "[b]ecause successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness." *Von Raab*, 489 U.S. 656, 672.

The successful performance of firefighters' duties depends just as uniquely on their judgment and dexterity as it does for Customs Service employees who carry firearms. Firefighters must be alert and ready to respond to an emergency at a moment's notice. Not only are they expected to battle huge blazes threatening numerous lives, they are also the first responders on the scene at many accidents.

Moreover, most firefighters are also certified Emergency Medical Technicians or paramedics who must constantly make split-second life and death decisions. The vast majority of calls firefighters respond to are medical emergencies. In these situations, a person's life depends on firefighters' ability to think quickly and clearly, something they would likely be unfit to do if under the influence of drugs or alcohol.

Finally, firefighters must respond to many emergencies involving hazardous materials. These situations pose a danger to scores of people. If not properly contained, a hazardous material spill could cause death or serious injury to literally hundreds, or even thousands, of citizens. The judgment and dexterity needed to respond to such a situation is certainly as great as that required of Customs

Service employees in deciding whether to use a firearm. Therefore, suspicionless drug testing of firefighters should similarly be upheld. Unfortunately, the Supreme Court of Arizona failed to make this connection and, in fact, erroneously applied this Court's precedent throughout its opinion.

B. A real and substantial risk exists to justify random drug testing regardless of evidence of drug use among firefighters because the public safety is genuinely in jeopardy if even a single firefighter performs his or her job while impaired.

In this case, the Supreme Court of Arizona explicitly held that random drug testing could be utilized only if the City had identified a "real and substantial risk." *Petersen*, 83 P.3d at 39. The Arizona Supreme Court substantiated this statement by citing to the opinion of this Court in *Chandler v. Miller*, 520 U.S. 305 (1997). The exact language of that opinion reads, "*Where public safety is not genuinely in jeopardy*, the Fourth Amendment precludes the suspicionless search." *Id.* at 323 (emphasis added).

The Arizona Supreme Court interpreted "real and substantial risk" to mean that the City must show that there has been clear evidence of a drug problem among firefighters in order to show that safety is genuinely in jeopardy. *Petersen*, 83 P.3d at 39. However, this Court has explicitly held that a "real and substantial risk" can be demonstrated even where the testing scheme was not implemented in response to any perceived drug problem when the employees occupy safety-sensitive positions. *Von Raab*, 489 U.S. 656, 673. Therefore, the more reasonable interpretation of "real and substantial risk" refers not to

the probable risk that firefighters are using drugs, but to the risk which would be imposed upon the public if even a single firefighter performed his or her duties while impaired.[5]

The Supreme Court of Arizona also erroneously held that even if a real and substantial risk had been identified, the testing would only be constitutional if the City could show that the program had been effective in deterring and detecting drug use among its firefighters. *Petersen*, 83 P.3d at 41. The Arizona Supreme Court then held that this standard had not been met because the record lacked even a single instance of drug use among firefighters and any evidence of accidents, fatalities, or injuries attributed to drug or alcohol use. *Petersen*, 83 P.3d at 39.

Once again, this conclusion cannot stand because this Court has held that it is this lack of evidence that often demonstrates that a drug testing program is successful and should be continued. *Von Raab*, 489 U.S. at 673. "When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. 656, 675.[6]

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[5] Nonetheless, Drexel Heights adopted the random component of its drug testing program in response to an accident in which the firefighter involved tested positive for marijuana.

[6] Both fire districts have had some positive tests since implementing their random components. In Northwest Fire District, two firefighters tested positive during a random test in 2001, and one tested positive during a random test in 2002. In Drexel Heights Fire District, one positive test was observed during random testing in 1993, 1996, and 1999.

Therefore, because the Supreme Court of Arizona erroneously applied this Court's precedent, amicus curiae respectfully request that this Court grant certiorari and correct the Arizona Court's error.

III. FIREFIGHTERS HAVE IMMEDIATE ACCESS TO CONTROLLED DRUG SUBSTANCES, THEREBY INCREASING THE RISK OF DANGER TO THE PUBLIC.

The substantial risk to the public posed by impaired firefighters is greatly increased due to the fact that these employees have constant and immediate access to controlled drug substances.

In their capacity as Emergency Medical Technicians, firefighters have constant access to commonly abused drugs including morphine and nitrous oxide.[7] Moreover, both Drexel Heights and Northwest Fire Districts are members of the Pima County Hazardous Materials Team. These firefighters are involved in discovering and shutting down methamphetamine labs throughout their jurisdictions, thereby giving them access to this highly hallucinogenic drug.

Access to these drugs means that the chances of a firefighter abusing them and endangering the public is

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[7] The drug boxes carried on both districts' fire engines and ambulances contain adenosine, albuterol sulfate, aspirin, atropine sulfate, calcium chloride, charcoal, dextrose, diazepam, diphenhydramine, dopamine, epinephrine, furosemide, glucagon, ipratroprium bromide, lidocaine, magnesium sulfate, methylpredinsolone, morphine, naloxone, nitroglycerin, nitrous oxide, oxytocin, phenylephrine, thiamine, and verapamil.

greatly increased. In 1993, Drexel Heights Fire District observed this danger first-hand when the then-current fire chief tested positive for morphine during a random test. It was later determined that the chief had been obtaining morphine from the drug boxes carried on district vehicles. He would remove the morphine ampules, break them open, remove the drug and replace it with normal saline, then replace the tampered ampule in the drug box.

This incident demonstrates that there is a "real and substantial risk" of drug use by firefighters. Therefore, amicus curiae respectfully request that this Court grant certiorari and validate the constitutionality of random, suspicionless drug testing in this context.

IV. PRE-EMPLOYMENT, POST-INCIDENT AND REASONABLE SUSPICION DRUG TESTING DO NOT ALLEVIATE THE RISK OF HARM TO THE PUBLIC AS EFFICIENTLY AS RANDOM DRUG TESTING.

Drexel Heights and Northwest Fire Districts each promulgate a drug testing program composed of four (4) components: pre-employment, post-incident, reasonable suspicion, and random. In the case at bar, the decision of the Supreme Court of Arizona suggests that the first three components of this testing program are sufficient to address any risk of harm to the public resulting from drug and alcohol use among firefighters. However, this argument overlooks many factors which make random testing particularly effective.

The use of pre-employment drug testing ensures that firefighters have not used drugs or alcohol immediately prior to being hired. However, this testing procedure does

nothing to prevent drug and alcohol use among firefighters beyond the hiring stage.

Reasonable suspicion is inherently inefficient as a drug testing procedure. While some individuals under the influence of drugs or alcohol may display signs and symptoms, many individuals are able to successfully hide their impairment from others. Because these individuals know that they are unlikely to invoke suspicion, they do not fear being caught and are not deterred from use. Moreover, the fact that many individuals are able to conceal their drug abuse does not mean that they are able to function safely.

Finally, post-incident drug testing addresses the risk of drug and alcohol impairment only after the public has already been harmed. It establishes a system in which nothing is done to prevent the first accident, but only subsequent accidents. In fact, it was this realization, following a potentially deadly accident, that led Drexel Heights to adopt the random component of its drug testing policy.

In 1992, a fire captain parked a fire engine weighing approximately 30,000 pounds in a parking lot and left to do some shopping for dinner. Unfortunately, he failed to set the parking break or deploy wheel chocks. While he was in the store, the truck rolled more than 50 feet into a culvert commonly played in by children. Fortunately, no children were present on this particular day, but the truck sustained over $24,000.00 in damage. Following the incident, the driver was subjected to a urinalysis and tested positive for drugs. Of course, this was only after he made a potentially deadly mistake. A random drug testing program would have likely detected his drug use prior to any accident, or deterred him from using drugs at all. The

notion that a public fire protection provider may not act to prevent a tragedy until it actually arises is both dangerous and unreasonable.

Therefore, amicus curiae respectfully urge this Court to grant certiorari in this matter and uphold random, suspicionless drug testing of firefighters.

V. THE DECISION OF THE SUPREME COURT OF ARIZONA IS IN DIRECT CONFLICT WITH THE DECISIONS OF SEVERAL UNITED STATES COURTS OF APPEALS CONCERNING THE SCOPE OF FOURTH AMENDMENT PROTECTIONS.

The Arizona Supreme Court, in this case, explicitly held that the random, suspicionless drug testing of firefighters is unreasonable and therefore violates the Fourth Amendment to the United States Constitution. *Petersen*, 83 P.3d at 37. This holding is in direct conflict with the decisions of several United States Courts of Appeals.

The Sixth Circuit was the first to specifically address the constitutionality of drug testing as applied to firefighters. In *Lovvorn v. City of Chattanooga*, three firefighters filed an action against their public employer challenging the constitutionality of proposed mandatory urinalysis tests. 915 F.2d 1065 (6th Cir. 1990). In upholding the constitutionality of the tests, the court stated that "the district court's conclusion that an employer must require a reasonable and particularized suspicion as a precondition to any such testing must perforce fail." *Id.* at 1067.

In 1997, the Third Circuit was posed with a slightly different question regarding the constitutionality of drug

testing as applied to firefighters. In *Wilcher v. City of Wilmington*, a class of firefighters and a union challenged the methods by which their employer conducted random drug tests. 139 F.3d 366 (3rd Cir. 1998). Despite the invasion of privacy inherent in the direct observation of urination utilized by the employer in conducting its tests, the court held that the tests were constitutional and firefighters' Fourth Amendment rights had not been violated. *Id.* at 378.

Finally, in 1998, the Court of Appeals for the Federal Circuit decided a case almost directly on point with the case before this Court. In that case, a civilian firefighter employed by the Navy was terminated when he refused to submit to a random drug test. *Hatley v. Dept. of the Navy*, 164 F.3d 602 (Fed. Cir. 1998). The firefighter then filed suit challenging the constitutionality of the tests. *Id.* In finding the tests to be constitutional, the court explicitly held that "the government's compelling interest in keeping its firefighters free of drugs outweighs the expectation of privacy of these employees." *Id.* at 604.

In contrast to all of the preceding rulings, the Supreme Court of Arizona has deemed random, suspicionless drug testing of firefighters to be unconstitutional based on the Fourth Amendment. *Petersen*, 83 P.3d at 37. The result of this holding is that firefighters in Arizona are now entitled to more protection based on the Fourth Amendment than firefighters in other jurisdictions. As the Fourth Amendment should not have different meanings in different states, amicus curiae respectfully request that the petition for certiorari be granted.

CONCLUSION

The successful performance of firefighters' duties depends uniquely on their judgment and dexterity. As the first responders on the scene in a wide range of emergencies, firefighters are consistently responsible for making life and death decisions.

Several Courts of Appeals have recognized that the safety-sensitive nature of the profession creates a substantial need to protect the public from firefighters who may be under the influence of drugs or alcohol. All of these courts have upheld the random drug testing of firefighters against Fourth Amendment challenges. Moreover, this Court has upheld suspicionless drug testing in analogous contexts. In sharp contrast, the Supreme Court of Arizona, in this case, held that random drug testing of firefighters is unconstitutional.

Amicus curiae respectfully urge this Court to grant the petition for certiorari in this case and clarify the scope of protections provided by the Fourth Amendment as applied to the drug testing of firefighters.

Respectfully submitted this 30th day of June, 2004.

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(4)

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IN THE

Supreme Court of the United States

CITY OF MESA,
Petitioner,
v.

CRAIG W. PETERSEN,
Respondent.

On Petition for a Writ of Certiorari to the
Arizona Supreme Court

BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

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I. INTEREST OF THE AMICUS[1]

The Institute for a Drug-Free Workplace ("the Institute") is a non-profit coalition of major businesses and business organizations dedicated to promoting and protecting the interests of employers and employees in effective and responsible drug-abuse-prevention programs. The Institute includes in its membership many of the largest employers in the United States, and a wide range of companies of all sizes, chambers of commerce, trade associations, and community coalitions.

Among other functions, the Institute disseminates information to assist in the development of workplace drug-abuse-prevention and -treatment programs, and to positively influence the national, state, and local consideration for drug-abuse-prevention issues. The Institute is uniquely positioned to provide relevant and helpful information on the nature and dangers of substance abuse, and on the design and implementation of effective policies and programs to combat substance abuse in the workplace, particularly where such policies and programs promote the safety and welfare of employees, their co-workers, and the public at large.

The Institute has a significant interest in the questions presented in *Petersen v. City of Mesa*. By holding that the City of Mesa ("Mesa") cannot randomly test its firefighters – a recognized safety-sensitive job – the Arizona Supreme Court has failed to recognize the catastrophic consequences that substance abuse can and does have on American workplaces – *particularly* substance abuse by employees in

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[1] The Institute hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the Institute for a Drug-Free Workplace, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

safety-sensitive positions. The decision inappropriately and unjustifiably undermines Mesa's, and by extension private-sector employers', ability to provide safe workplaces and to take necessary and appropriate steps to protect life and property.

The Institute's members – and the employer community at large – have a strong interest in ensuring that the random-testing component of their drug-free-workplace policies and programs will *not* be undermined by the Arizona Supreme Court's decision. This decision, if not reversed by the Court, could drastically affect private-sector employers' drug-free-workplace policies and programs by calling into question the legality of random drug testing – a practice which has the greatest deterrent impact on employee substance abuse; by inviting legal challenges; by having a "chilling effect" on employers' commitment to random drug testing and aggressive substance-abuse-prevention programs, even for the most safety-sensitive of positions; and therefore by indirectly jeopardizing the safety and health of millions of Americans.

II. SUMMARY OF ARGUMENT

The disturbing decision of the Arizona Supreme Court in *Petersen v. City of Mesa* has the potential to reach far beyond the public sector, and to substantially and detrimentally impact the *private* sector and the entire legal and practical landscape surrounding workplace substance-abuse-prevention and drug-testing programs.

The decision is contrary to the body of jurisprudence in this area – including the U.S. Supreme Court's past decisions on drug testing, contrary to the oft-repeated positions and requirements of the U.S. Congress and several Federal

Government agencies, and contrary to common practice and wisdom.

Moreover, the impact on the employer community – and its employees – would be enormously harmful – both in regulated and unregulated industries.

Perhaps most harmful to the private sector would be the principles articulated by the Arizona Supreme Court: that random drug testing is somehow unfair and unnecessary (even for highly safety-sensitive positions); and that individualized suspicion should be required for employee testing and is adequate to deter and detect employee drug abuse.

Among the many *private*-sector consequences of this decision, the mischaracterization of the nature and value of random drug testing, and drug testing overall, is among the most troubling. This mischaracterization, if not corrected, is dangerous to the employer community *and* to American society overall.

Unless the U.S. Supreme Court reverses the Arizona Supreme Court's decision – *and* if the Arizona Supreme Court's heretofore unique interpretation of the law were to be more widely adopted – there will be *more* challenges to current and effective workplace substance-abuse-prevention programs, *more* drug abuse, *less* treatment (because of the lower number of substance-abuse problems identified), *more* workplace accidents, *more* drug-related injuries and fatalities, and a *less* safe Arizona and America.

The Institute for a Drug-Free Workplace respectfully urges the U.S. Supreme Court to grant *cert* to the Petitioner in *Petersen v. City of Mesa*, and subsequently to reverse this

decision that is so undermining of our national policy on workplace substance-abuse prevention.

III. ARGUMENT

A. THE *PETERSEN v. CITY OF MESA* DECISION IS OF KEEN INTEREST TO THE EMPLOYER COMMUNITY.

Although *Petersen v. City of Mesa* concerns a public-sector employer and public-sector employee firefighters, this decision has the potential to tremendously and detrimentally impact private-sector employers and employees.

Random drug testing is part of the fabric of American corporate culture in 2004. It is entrenched, accepted, widely in use, growing in popularity, and proven to be both effective and cost-effective.

The private-sector employer community is opposed to any assault on random drug testing, particularly one that challenges the validity of random drug testing *even* in the context of highly safety-sensitive positions such as firefighters.

Moreover, a negative decision on random drug testing – such as that rendered by the Arizona Supreme Court – could cast an enormous shadow over the employer community's legal and practical assessment of random drug-testing policies and programs.

Seminally at stake is the *concept* of random drug testing – whether it is legal, appropriate, justified, and effective...and whether it prevails in a balancing test between the legitimate privacy rights of the individual, and the societal, employer, and employee interests in preventing

substance abuse and its myriad deleterious effects in our workplaces and in our communities.

Again and again, this Court – and virtually all of our Federal courts of relevant jurisdiction at all levels – have resolved this balancing test *in favor* of drug testing as a useful, legitimate, appropriate, and even necessary *means* to prevent a highly undesirable *end* – the loss of life and property that substance abuse so often and so tragically claims.

What is at stake for the private-sector employer community in *Petersen v. City of Mesa*? The health, safety, and well-being of its workers, and those who use its products and services. *This* is high stakes.

(1) <u>There are Comparable Jobs to Firefighters in the Private Sector</u>.

Many employers – in essence – have their *own* fire departments, or comparable employee units in their workplaces. This is particularly true for the petrochemical, construction, and mining industries – especially at certain remote or highly dangerous work sites. Whether the employees are designated as firefighters, or have firefighter (and/or related) responsibilities, the principles are the same.

Yes, the Fourth Amendment's protections against unreasonable searches and seizures are not directly relevant to private-sector employees (unless their drug testing is mandated by the Federal Government).

However, the fundamental *justification* for random drug testing of safety-sensitive employees is equally at issue. "Safety-sensitive" is defined the same way in the private and public sectors; random drug testing is conducted virtually

identically in the private and public sectors; and the potential harms from impaired and/or substance-abusive employees are mirror images in the private and public sectors.

Even if the comparable jobs are not firefighters, they can be in other corporate disciplines of a health- and safety-sensitive nature: security, emergency response, medical, safety and health, environmental, and damage control units within a private-sector work force would all be highly analogous to firefighters in their safety-sensitive nature.

(2) Private-Sector Employees and Property are At Risk If Public-Sector Firefighters are Substance Abusers.

Employers – like other elements of our communities – *rely* upon firefighters and related government employees (e.g., law enforcement, ambulance attendants, rescue teams) to be available, responsive, and effective.

Frequently, employees' lives are at risk. Public safety may be at risk. Protection of property from destruction – or from further destruction – may be at stake. The prevention of injuries, or the minimizing of the severity of injuries, and even the survival of significant numbers of people may be in the balance.

If public-sector firefighters are unavailable due to substance-abuse-related injuries and illnesses, treatment, or adverse employment action… *or* are "underperforming" due to impairment caused by substance abuse… *or* are otherwise absent, distracted, *or* conflicted by their substance-abuse problems – employers and employees in the private sector may well be, indirectly, the victims.

Employers and employees – like others in our communities – *need* a substance-abuse-free firefighter work force at its best, fully functional, and highly effective and responsive.

(3) American Employers in Regulated Industries Typically Adopt Their Substance-Abuse-Prevention Programs for *All* Employees.

Most employers – given the choice of two distinctly different, and in major respects contrary, substance-abuse-prevention and testing programs, *or* one consistent universally applied program – choose "one."

Thus, for example, most employers with significant numbers of employees subject to the U.S. Department of Transportation's ("DOT") substance-abuse-prevention regulations, choose to *extend* the same policy and programs to *all* of their employees equally.

Thus, if the illogic of the Arizona Supreme Court were to be widely adopted, random testing under the DOT rules would be *highly* vulnerable to legal challenge, and – in turn – voluntary corporate policies and programs based on the DOT model *also* would be significantly called into question.

To invalidate random testing in the *public* sector is to – arguably – invalidate all federally mandated random drug testing in the *private* sector, because the Fourth Amendment basis on which the Arizona Supreme Court decided *Petersen v. City of Mesa* is equally applicable to federally mandated drug testing in the private sector.

If employers, in turn, are forced to dismantle their current DOT-compliant substance-abuse-prevention policies and programs due to the unconstitutionality rulings of the

Arizona Supreme Court, and/or other courts, these employers will simultaneously abandon their parallel policies and programs as applied to non-DOT-covered employees (as would happen for employees subject to comparable U.S. Department of Energy, U.S. Nuclear Regulatory Commission, and U.S. Department of Defense regulations...and their non-covered, employee counterparts).

The results would be wasteful, counterproductive to the goal of substance-abuse-prevention, chaotic, and deplorable as a wholesale retreat from what works – and works *well* – in the necessary and appropriate war on drugs.

(4) <u>The Reversal of Federally Mandated Random Drug Testing Would Be Costly and Unfair</u>.

Moreover, how fair would this be to the American employer community? Having been told by Federal Government agencies – and indirectly by the U.S. Congress – that you *must* combat substance abuse in your workplaces, you *must* do extensive random drug and alcohol testing, you *must* expend many millions of dollars and staff hours, and other resources, on very specific and comprehensive substance-abuse-prevention policies and programs, they would now – in essence – be told that their *mandated* efforts were unconstitutional and inappropriate.

The reversal would carry a huge price tag, as the costs – directly and indirectly – of dismantling a substance-abuse-prevention and testing program could far exceed the costs of its initial implementation.

Among these costs could be the costs of potential legal liability. What happens to those employees who were fired – or job applicants who were denied employment – as a result of an employer's testing and/or compliance with DOT

regulations (or other Federal agency regulations), regulations which could – based on the Arizona Supreme Court's reading of the Constitution – be illegal? Are there not myriad and enormous potential legal liabilities?

(5) Invalidating Random Testing Could Create a Litigation Explosion.

Beyond the legal issues involving employees in regulated industries, it is clear that the legal landscape on drug testing overall would be drastically altered if the *Petersen v. City of Mesa* decision were to be widely embraced by the courts. If *firefighters* cannot be randomly tested, what would be the justification for assembly line workers, construction crews on the road, or forklift operators – let alone employees in more traditional "white-collar" working environments?

The debate would be reshaped. The premise – currently widely held – that drug testing is a good and necessary tool would be under increasing, and more compelling, attack. The plaintiffs' bar would be emboldened. There certainly would be more legal challenges, more of a backlog in the courts, and more expenses – unnecessary and unproductive expenses – to employers in defending the onslaught of challenges. If *firefighters* cannot be randomly tested, who can be?

Moreover, the higher likelihood of legal challenges, and the uncertainty of their outcomes, could render some employers more hesitant to take adverse employment action against employees who violate their substance-abuse-prevention policies and/or test positive (i.e., employees who *deserve* adverse employment action).

Employers who heretofore have largely been given the "green light" by the courts to do drug testing, could suddenly

become "gun shy" about taking adverse employment action against those who engage in the criminal behavior of illicit drug use. How can that possibly be a good thing?

The legal principles and precedents on workplace drug testing were crystal clear. Employers who did drug testing in the most responsible and accurate ways had little to fear legally.

Petersen v. City of Mesa would – if not reversed – change that. The waters would be muddied. Employer rights – and, for that matter, the rights of drug-abuser employees – would be fluid and open and subject to further debate and challenge.

What was settled – and appropriately so – would become unsettled. The law of random drug testing in the private sector would – at the least – become uncertain.

(6) Unless Reversed, *Petersen v. City of Mesa* Will Have a "Chilling Effect" on Employers.

"Uncertain" is not something in-house counsel at corporations like.

Many have condoned – even embraced – random drug testing (and other forms of drug testing *and* elements of a substance-abuse-prevention program) *because* the law was supportive – and their rights as an employer were clear.

If the new legal "order" calls into question random drug testing of even those individuals who are engaged in the most highly safety-sensitive of duties, then the perception may become that the tide has turned – or is turning – on random drug testing, drug testing in general, and maybe even comprehensive substance-abuse-prevention efforts.

Some employers, who were considering adopting such policies and programs, may not do so. Some who were planning an expansion of their current policies and programs, may not do so. Random drug testing, steadily gaining in use in the workplace, may recede in usage and popularity.

It is not just "about" the dismantling or abandonment of programs, as discussed earlier (e.g., DOT-compliant programs and their employer-voluntary extensions to non-covered employees, *or* DOT-look-alike programs), it is also about those policies and programs that would have been adopted and are not – *because* such a radical decision as *Petersen v. City of Mesa* is now part of the equation.

(7) <u>The Credibility of Random Testing Will Be Tarnished</u>.

Petersen v. City of Mesa, a public-sector employee decision, also detrimentally impacts random drug testing in the *private* sector because the image of random drug testing is badly harmed by the decision – and its attendant press coverage.

The message from the Arizona Supreme Court – for some people at least – is that we do not need random drug testing, even for highly safety-sensitive employees, that testing based on individualized suspicion is fair and adequate and random testing is unfair and excessive, and that the courts look unfavorably on random testing as a practice.

The *perception* of random drug testing may be altered in many peoples' minds, reasonable people, people who otherwise would have readily accepted the practice – especially people in Arizona.

The problems with this misguided message are that: (1) it undermines many employer drug awareness and education programs; (2) it contradicts employers' repeated communications that random drug testing is appropriate and necessary (and, indeed, in employees' interests since it helps promote more drug-free and safer workplaces); and (3) it increases the likelihood of morale problems, pushback, lack of cooperation, and/or legal challenges.

At stake in the minds of the public – and more specifically, to employees *and* managers – is the rationale for, credibility of, and effectiveness of random drug testing.

Employers in the private sector often can work so vigilantly to get their messages through to their work force, to garner "buy-in" from their managers and employees into their substance-abuse-prevention programs, and to justify the need for and appropriateness of their drug-testing policies.

Petersen v. City of Mesa undermines these efforts, has a highly negative "public relations" impact, and harms the image and credibility of random drug testing. The U.S. Supreme Court has the opportunity to restore and renew the credibility and prestige of random drug testing as an employment practice.

(8) Many Private-Sector Employees Work at Public-Sector Work Sites and Public-Sector Employees' Health and Safety *Could* Detrimentally Affect Them.

There is a large government contractor work force – particularly here in the Washington, DC area – which routinely works in Federal Government buildings and/or on Federal Government property.

Thus, if Federal employees are impaired on-the-job – and/or if their public-sector employees' substance-abuse problems are not effectively addressed, deterred, detected, and treated – the impact on their "co-worker" private-sector government-contractor employees can be highly detrimental, threatening, even tragic – particularly when the employees are in safety- or security-sensitive positions and/or at safety- or security-sensitive locations.

It is not just firefighters for whom we strive to make it absolutely certain that they are drug-free. What about those employees in law enforcement, military, medical research, air traffic control, the penal system, border protection, and comparable fields – public-sector employees who often work side-by-side with private-sector employees?

Government contractors – and their employees – clearly have a direct and compelling interest in their public-sector counterparts being drug-free – and being randomly tested to help achieve this end.

(9) <u>There is a "Revolving Door" Between the Public and Private Sectors and Private-Sector Employers Expect That Public-Sector Employees Be Drug-Free</u>.

DOT employees frequently "graduate" to work for major airlines or railroads. The Federal Bureau of Investigation and the U.S. Drug Enforcement Administration agents routinely retire to go to work in corporate security. National Institutes of Health researchers commonly leave to work at private health care facilities, universities, and/or pharmaceutical companies.

As those of us in Washington, DC are particularly aware, there is a "revolving door" between the public and private sectors.

The private sector has a legitimate and compelling interest in being assured that those employees they hire – particularly those from the Departments of Defense, Transportation, and Energy, or from the Nuclear Regulatory Commission, are *not* substance abusers and do not have a past history of substance abuse. These are the types of employees for whom impairment can cause catastrophic workplace accidents, breaches in security, and/or destruction of property. Every appropriate precaution should be taken *prior* to hiring and inclusion in a safety-sensitive or security-sensitive environment.

Certainly, a history of "negative" random-drug-test results while in the government is helpful to the private-sector's hiring decisions and evaluations. Take away this useful means of evaluations, and the process is compromised. Screening out current drug abusers is even *more* critical.

(10) <u>Individualized Suspicion Testing is Not Enough – In the Public *or* Private Sectors</u>.

Finally, the logic of the Arizona Supreme Court that individualized suspicion as a trigger to drug testing ("for-cause" testing) is adequate to deter and detect illicit drug abuse is highly flawed – and dangerous to both the public and private sectors.

If a workplace-drug-testing program is based exclusively on individualized suspicion – few employees will be tested and fewer yet will be "caught." The deterrent effect will be negligible.

One Institute member – a major high technology company – conducted 55,000 random drug tests of employees in two years, after having only 120 for-cause tests

in the previous two years before implementation of random testing.

For-cause testing alone is *not* sufficient. It quite obviously does not have the same deterrent impact (how could it – the chances of being referred for a test are so small), and it results in dramatically fewer employee substance-abuse problems being identified.

Moreover, for-cause testing is less fair, more subjective, and more subject to abuse than random testing. In random testing programs, typically *every* employee has an *equal* chance of being selected for testing.

Finally, an individualized suspicion referral process rewards the good actors, the clandestine "sneaks," and the effective cheaters and "concealers."

It is dangerous and wrong to advance – as the Arizona Supreme Court has – the doctrine that individualized suspicion should be required for employee drug testing, and this position is clearly just as objectionable in the private sector as in the public sector.

B. THE ARIZONA SUPREME COURT'S DECISION CONFLICTS WITH THE WEIGHT OF LAW AND RECOGNIZED PUBLIC POLICY.

The Arizona Supreme Court's decision conflicts with the overwhelming majority of the decisions regarding random drug testing for safety-sensitive employees. Similarly, the U.S. Congress, various federal agencies, and a significant number of states have recognized the necessity for random drug testing of employees in safety-sensitive positions, and the appropriateness of random drug testing overall for *any* employee.

(1) <u>The U.S. Supreme Court Has Supported Testing for Safety-Sensitive Employees</u>.

In each of the three cases in which the United States Supreme Court has addressed the issue of workplace drug testing, the Court has upheld drug testing.[2] In two of the cases in which the U.S. Supreme Court has addressed drug testing in the public sector, the Court has similarly supported the propriety of drug testing.[3] More importantly, the U.S. Supreme Court has recognized the critical interests in ensuring a safe workplace and requiring testing of employees working in dangerous positions. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

Federal courts have followed the U.S. Supreme Court's lead and have consistently upheld the random testing of safety-sensitive employees, including *specifically* the random testing of firefighters.[4] Nonetheless, the Arizona

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[2] *See Eastern Associated Coal Corp. v. United Mine Workers of Amer.*, 531 U.S. 57 (2000); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

[3] *See Board of Educ. of Indep. Sch. Dist. No. 9 v. Earls*, 122 S. Ct. 2559 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). In *Chandler v. Miller*, 520 U.S. 305 (1997), the U.S. Supreme Court held that Georgia's requirement that candidates for office take and pass a drug test to qualify for high office was not constitutional. This case is not relevant to random testing in the workplace.

[4] *See, e.g., Hatley v. Department of the Navy*, 164 F.3d 602 (Fed. Cir. 1998) (firefighters); *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991); *International Bhd. of Teamsters v. Department of Trans.*, 932 F.2d 1292 (9th Cir. 1991); *Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (firefighters); *Thompson v. Marsh*, 884 F.2d 113 (4th Cir. 1989); *Guiney v Roache*, 873 F.2d 155 (1st Cir. 1989); *Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988); *Rushton v.*

Supreme Court has chosen to ignore these well-established precedents, by holding that Mesa's random testing of its firefighters violates the Fourth Amendment of the U.S. Constitution.

(2) The U.S. Congress and Federal Agencies Support Testing for Safety-Sensitive Employees.

The Federal Government has repeatedly and enthusiastically embraced random drug and alcohol testing as a useful tool to prevent employee substance abuse and to protect employees and the public at large. Together, the Executive and Legislative Branches of our Government have adopted a widespread and well-established national policy decisively *in favor* of the use of random testing.

For example, in 1991, the U.S. Congress enacted the Omnibus Transportation Employee Testing Act ("OTETA"), 49 U.S.C. § 5331 (1991), mandating the drug and alcohol testing of safety-sensitive employees in transportation-related jobs. In response to OTETA, the DOT established mandatory substance-abuse-prevention requirements for 8.1 million private-sector workers in safety-sensitive transportation-related positions.[5] These requirements include comprehensive random drug and alcohol testing of these safety-sensitive employees. The DOT specifically recognized the necessity of random testing to help minimize the negative consequences of substance abuse by employees, and to help protect the safety and health of employees and the public at large.

Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

[5] *See* 14 C.F.R. Part 121, Appendices I and J (2003); 46 C.F.R. Part 16 (2003); 49 C.F.R. Part 199 (2003); 49 C.F.R. Part 219 (2003); 49 C.F.R. Part 382 (2003); 49 C.F.R. Part 655 (2003).

Similarly, the Departments of Energy and Defense, and the Nuclear Regulatory Commission have issued regulations requiring drug testing of their safety-sensitive employees and the employees of their contractors.[6] Again, these regulations require widespread random testing.

Congress and these federal agencies have recognized the necessity for random testing of safety-sensitive employees. The Arizona Supreme Court's decision conflicts with this virtually universal legal principle.

(3) Many States Support Random Testing.

Although nearly half of the states have not addressed drug testing requirements at all,[7] the clear majority of the states that have done so permit, encourage, and/or require random testing. A number of states have voluntary workers' compensation testing laws, under which employers receive a premium discount on their workers' compensation premiums if they choose to implement a drug-testing program in compliance with the statute. Of those, seven permit random testing and two require random testing regardless of whether the employee is – or is not – specifically a safety-sensitive employee.[8] These states have recognized that drug testing, and random drug testing in particular, reduce the frequency and severity of accidents. They *reward* employers for acting responsibly to reduce drug abuse in its workplace.

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[6] *See* 10 C.F.R. Part 26 (2003); 10 C.F.R. Part 707 (2003); 48 C.F.R. § 252.233-7004(c)(4)(i)(2003).

[7] Twenty-three states do not address the permissibility or impermissibility of random drug testing.

[8] Alabama, Arkansas, Florida, Georgia, Mississippi, Ohio, and Tennessee encourage random drug testing in the private sector as part of their workers' compensation testing programs. Ohio requires random testing for an increased discount, and South Carolina requires random testing for *any* workers' compensation discount.

Other states have recognized the importance of a drug-free workplace beyond simply a reduction in accidents and injuries. Several states have voluntary testing laws which permit – indeed, encourage – an employer to randomly test all of its employees.[9] Other states specifically permit random testing under their mandatory testing laws.[10]

Finally, a few states permit random testing of only safety-sensitive employees, recognizing the substantial and specific need for such testing to help prevent the detrimental effects of substance abuse to the health and safety of the employees, themselves, their co-workers, and the public at large.[11] Thus, even those states that have expressed some concerns regarding random drug testing, have consistently recognized that random testing is – at a minimum – essential for *safety-sensitive* employees, such as those who are the subject of *Petersen v. City of Mesa*.

The clear public policy of these states – indeed *all* states that have addressed the issue of random testing (except, ostensibly, Arizona) – is that random testing is a positive and necessary tool for combating substance abuse in the workplace and preventing the negative consequences of substance abuse, including workplace accidents.

IV. CONCLUSION

The Arizona Supreme Court's decision constitutes an unnecessary and inappropriate retreat in the war on drugs,

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[9] The states include Alaska, Arizona, Idaho, Mississippi, and Utah.

[10] Iowa, Kansas, Louisiana, Maine (for 50 or more employees), Maryland, Nebraska, North Carolina, Oklahoma, and Oregon, as well as Puerto Rico.

[11] These states include Connecticut, Minnesota, and Montana. Other states' case law limits random testing to safety-sensitive employees: Massachusetts, New Jersey, and West Virginia

would undermine the philosophical rationale behind *random* drug testing, would ignore its deterrent and detection impacts, would embolden the employee drug abusers, and their suppliers and defenders, would create a plethora of new and counterproductive litigation, would have a "chilling effect" on employers' commitment to drug-free workplaces and drug testing, and could ultimately create thousands of less safe workplaces and put millions of Americans' health and safety in jeopardy. This *all* would be *decisively* against American society's interests.

The Institute for a Drug-Free Workplace respectfully urges the United States Supreme Court to grant the Petitioners the writ of *certiorari* to review the judgment below, and to reverse the Arizona Supreme Court's decision on *Petersen v. City of Mesa*, and therefore to uphold the random drug testing of the City of Mesa's firefighters as Constitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug and alcohol testing of firefighters and other employees in safety-sensitive positions unless a municipality first can show direct evidence of substance abuse among the specific group to be tested.

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA"), since it establishment in 1935, has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada. The National League of Cities ("NLC"), founded in 1924, represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Both *amici* have appeared before the Supreme Court and other federal and state tribunals.

Amici have a compelling interest in ensuring that cities retain the flexibility to decide whether (and how) to test their firefighters and other employees in safety-sensitive positions for drugs and alcohol. Cities around the country confront problems of substance abuse among firefighters and other first responders. Such substance abuse risks disastrous consequences if it causes an accident or impedes a firefighter's ability to fight a fire or to help others evacuate a burning building. If the Arizona Supreme Court's decision is allowed to stand, it will tie the hands of local governments and thwart their efforts to prevent such catastrophes.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for a writ of *certiorari* for three reasons.

First, the Arizona Supreme Court's decision conflicts with this Court's and other courts' decisions upholding suspicionless drug testing of public employees working in safety-sensitive positions. *See Nat'l Treasury Employees Union* v.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

Von Raab, 489 U.S. 656 (1989); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). In both *Von Raab* and *Skinner*, this Court held the government's compelling interests in deterring and detecting drug abuse among these employees outweighed the employees' reduced privacy interests. In reliance on *Von Raab* and *Skinner*, lower courts have rejected Fourth Amendment challenges to suspicionless drug and alcohol testing programs for firefighters and other employees in safety-sensitive positions. In direct conflict with the decision below, the Federal Circuit, the Sixth Circuit and the Maryland Court of Appeals have held that programs of suspicionless testing for firefighters do not violate the Fourth Amendment.

Second, the Arizona Supreme Court has decided an important question of federal constitutional law—namely the constitutionality of random testing programs for firefighters. While most firefighters perform their important duties ably, substance abuse remains a real problem at the nation's firehouses. To combat this problem, municipalities around the country have adopted (or are considering adopting) drug and alcohol testing programs. Review by this Court will provide much-needed guidance about the constitutionality of these important efforts.

Third, the Arizona Supreme Court's decision calls into doubt the constitutionality of numerous federal laws that mandate random testing for employees working in safety-sensitive positions. Of particular importance to localities, the decision below casts doubt on the constitutionality of the Omnibus Transportation Employee Testing Act of 1991 ("OTETA"), which conditions federal highway funds on the implementation of random testing programs for certain transit employees and public safety employees. Only this Court can provide the necessary guidance to local governments about whether their compliance with conditions for the receipt of federal funding comports with the Constitution.

ARGUMENT

I. The Arizona Supreme Court's Invalidation Of Mesa's Program Conflicts With The Decisions Of This Court And Several Lower Courts Consistently Holding That Suspicionless Testing Of Employees In Safety-Sensitive Positions Does Not Violate The Fourth Amendment.

The Fourth Amendment proscribes only "unreasonable" searches and seizures, U.S. Const. amend. IV, and this Court has articulated a clear framework for evaluating the reasonableness of a testing program. It should serve "special needs" beyond the normal need for law enforcement. *E.g., Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001). It also must advance important governmental interests that outweigh the intrusion (if any) on the privacy of those tested. *E.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County* v. *Earls*, 536 U.S. 822, 829 (2002). Here, the Arizona Supreme Court correctly found (as Respondent conceded) that the City of Mesa's program served special needs beyond law enforcement. Appendix to Petition For a Writ of *Certiorari* ("App.") 6a. Yet its analysis of the governmental and privacy interests collides with this Court's precedents on the constitutionality of suspicionless testing generally and widens a disagreement among the lower courts over the constitutionality of such testing in the specific context of firefighters and other public employees in safety-sensitive positions.

A. The Arizona Supreme Court's decision conflicts with this Court's decisions in *Von Raab* and *Skinner*.

This Court consistently has held that the Fourth Amendment does not bar suspicionless drug testing of employees in safety-sensitive positions. In *Von Raab*, the Court upheld a program of suspicionless drug testing of certain employees in the United States Customs Service. 489 U.S. at 668. The Court held that the government had a "compelling interest in

ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment," and that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 670-71. It also found that "operational realities of the workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts" and that customs officers "reasonably should expect effective inquiry into their fitness and probity." *Id.* at 671-72 (internal quotations and citation omitted). Because the government's interests outweighed the employees' privacy expectations, the Court rejected the Fourth Amendment attack. *Id.* at 677.

In *Skinner*, the Court upheld a program of suspicionless drug testing (including urinalysis) of railroad employees following an accident. As in *Von Raab,* the Court held that the government had a "compelling" interest in testing because the railroad employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" and "can cause great human loss before any signs of impairment become noticeable to supervisors or others." 489 U.S. at 628. On the other side of the balance, the Court found the intrusions on privacy to be "limited." *Id.* at 625. The urine sample was not furnished under direct observation and was reviewed by medical personnel unrelated to the employer. Moreover, railroad employees worked "in an industry that is regulated pervasively to ensure safety" and thus had "a diminished expectation privacy" in information about their physical condition. *Id.* at 626-27. Balancing these interests, the Court upheld the program. *Id.* at 633.

The Arizona Supreme Court's decision striking down Mesa's program cannot be reconciled with *Von Raab* and *Skinner*. Just like the employees in *Von Raab* and *Skinner*, firefighters occupy safety-sensitive positions—a fact that

every court in this case has acknowledged. App. 7a (Supreme Court), 30a-31a (Court of Appeals), 52a (trial court). As the Arizona Court of Appeals explained, Mesa's interest in testing those employees is compelling:

> Firefighters must be mentally alert at all times in order to instantly respond to a crisis and grasp and follow orders, particularly where a split-second decision or error in judgment may prove fatal; they also must be physically fit in order to perform under the extremely demanding and dangerous conditions that jeopardize their own lives, the lives of their co-workers, and the lives and property of the public. App 30a.

The Arizona Supreme Court sought to distinguish *Von Raab* on the ground that "[Mesa's] firefighters are not directly involved in drug interdiction, do not carry a firearm, and are not required to use deadly force in the regular course of their duties." App. 10a. This crabbed reading of *Von Raab* is untenable. While the *facts* of *Von Raab* may have been so limited, the decision's *reasoning* swept more broadly to cover a variety of safety-sensitive settings. 489 U.S. at 675 n.3 (approving suspicionless scanning of passenger luggage at airports due to the risk of terrorism).

The Arizona Supreme Court also claimed that "the firefighters' communal work environment provides a better opportunity for supervisors to detect drug use and therefore develop reasonable suspicion to conduct a test under appropriate circumstances." App. 10a. Yet "[d]etecting drug impairment on the part of employees can be a difficult task," *Von Raab*, 489 U.S. at 674, and it is absurd to expect firefighters or their supervisors to become expert in the art of detection. *See Skinner*, 489 U.S. at 628. Moreover, the "communal work environment" may *discourage* rather than encourage reporting if employees are reluctant to share their speculative suspicions about a fellow employee with whom they must live and work on a regular basis. As the Arizona Court of Appeals explained, firefighters' communal work

environment "engenders camaraderie and a certain esprit de corps" that "may make testing dependent on individualized suspicion less effective or less likely to occur." App. 31a.

Similarly faulty reasoning infects the Arizona Supreme Court's analysis of firefighters' privacy interests. The Arizona Supreme Court acknowledged that "individuals who elect to become firefighters should anticipate a diminished expectation of privacy and should reasonably expect some intrusion into matters involving their health and fitness," App. 12a, yet concluded that the testing impermissibly invaded these admittedly reduced privacy expectations. That conclusion also collides with *Von Raab* and *Skinner*. The precautions taken by Mesa to ensure the firefighters' privacy—urination in a private stall, testing only for the presence of certain illicit substances, analysis by a medical officer and confidential treatment of the results—strongly resemble the types of precautions that caused this Court to uphold the programs in *Von Raab* and *Skinner*. *Von Raab*, 489 U.S. at 672 n. 2; *Skinner*, 489 U.S. at 626-27; *see also Earls*, 536 U.S. at 832-33 (upholding random drug testing program that, like Mesa's, specified that the urine sample could be provided in a closed stall and required that test results be kept in confidential files). Thus, had the Arizona Supreme Court properly applied *Von Raab* and *Skinner*, it would have concluded, as the Arizona Court of Appeals did, that Mesa's program does not violate the Fourth Amendment.

B. The Arizona Supreme Court's decision conflicts with several lower courts' decisions that have upheld suspicionless testing programs for firefighters and other employees in safety-sensitive positions.

Unsurprisingly, the decision below throws the Arizona Supreme Court into conflict with other lower courts over the constitutionality of random testing of firefighters. Following *Von Raab* and *Skinner*, several lower courts have sustained

suspicionless testing programs for firefighters and other employees in safety-sensitive positions. *See generally* Kathleen M. Dorr, Annotation, *Validity, Under Federal Constitution, of Regulations, Rules, or Statutes Requiring Random or Mass Drug Testing of Public Employees or Persons Whose Employment is Regulated by State, Local, or Federal Government*, 86 A.L.R. Fed. 420 § 3[d] (1988 & Supp. 2003) (collecting cases). For example, the Federal Circuit unanimously rejected a Fourth Amendment challenge to a random drug testing program for firefighters on military bases. *Hatley* v. *Dep't of the Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998). The court found that "the government's compelling interest in keeping its firefighters free of drugs outweighs [firefighters'] expectation of privacy. . . ." *Id.*

Similarly, Maryland's highest court unanimously rejected a Fourth Amendment challenge to a program of suspicionless drug testing of police and firefighters. *City of Annapolis* v. *UFCW, Local 400*, 565 A.2d 672, 682-83 (Md. 1989). Like the Federal Circuit in *Hatley*, the Maryland Court of Appeals concluded that "[t]he City's interest in the safety of uniformed police or fire personnel, their co-workers, and the public served by them is of a sufficient compelling nature that [it] substantially outweighs the negligible private interest here involved." 565 A.2d at 681.

Finally the Sixth Circuit, sitting *en banc*, unanimously held that the Fourth Amendment does not require reasonable suspicion as a precondition to testing firefighters for drugs and alcohol. *Penny* v. *Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) (*en banc*). Tellingly, in *Penny*, the full Sixth Circuit *vacated* panel opinions that had *struck down* suspicionless testing programs for firefighters and police officers on Fourth Amendment grounds, finding those panel opinions irreconcilable with *Von Raab* and *Skinner*. *Id.*, *vacating Lovvorn* v. *City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) and *Penny* v. *Kennedy*, 846 F.2d 1563 (6th Cir. 1988).

A few courts have sided with the Arizona Supreme Court and invalidated random drug testing programs for firefighters under the Fourth Amendment.[2] The Alaska Supreme Court recently held that a program of random drug testing of firefighters violated the Fourth Amendment's analogue in Alaska's state constitution. *See Anchorage Police Dep't Employees Ass'n* v. *Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001). *Cf. Guiney* v. *Police Comm'r of Boston*, 582 N.E.2d 523, 524-27 (Mass. 1991) (holding that random drug testing of police officers violated Massachusetts Declaration of Rights but not the Fourth Amendment). While the Alaska Supreme Court anchored its holding in state law, its analysis will influence the federal constitutional analysis of other courts. *See* App. 15a (finding the Alaska Supreme Court's constitutional analysis "persuasive").

This Court should intervene to resolve this widening disagreement among the lower courts over the constitutionality of suspicionless drug testing of firefighters. Under the reasoning of several federal and state appellate courts, Mesa's program likely would have survived Fourth Amendment challenge.[3] Under the reasoning of the Arizona Supreme Court, the programs at issue before the Federal Circuit, the Sixth Circuit and the Maryland Court of Appeals probably would have violated the Fourth Amendment.

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[2] *See Beattie* v. *City of St. Petersburg Beach*, 733 F. Supp. 1455 (M.D. Fla. 1990); *Capua* v. *City of Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986); *City of Palm Bay* v. *Bauman*, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985).

[3] Several federal district courts and state intermediate appellate courts also have rejected Fourth Amendment challenges to suspicionless drug testing programs for firefighters. *See, e.g., Aguilera* v. *City of East Chicago Fire Serv. Comm'n*, 768 N.E.2d 978 (Ind. Ct. App. 2002); *Doe* v. *City and County of Honolulu*, 816 P.2d 306 (Haw. Ct. App. 1991) (*per curiam*); *Am. Fed'n of Gov't Employees, Local 1533* v. *Cheney*, 754 F. Supp. 1409 (N.D. Cal. 1990); *Plane* v. *United States*, 750 F. Supp. 1358 (W.D. Mich. 1990); *Brown* v. *Winkle*, 715 F. Supp. 195 (N.D. Ohio 1989).

Read more broadly, the Arizona Supreme Court's decision also clashes with numerous appellate court decisions that have rejected Fourth Amendment challenges to testing of employees in other safety-sensitive occupations. For example, a panel of the First Circuit, including then-Judge Breyer, upheld a program of random drug testing of police officers carrying firearms and involved in drug interdiction. *Guiney* v. *Roache*, 873 F.2d 1557, 1558 (1st Cir. 1989) (*per curiam*). The First Circuit found the case indistinguishable from *Von Raab*. *Id.* Other appellate courts have rejected similar challenges to suspicionless drug testing programs for employees such as police officers, prison guards and nuclear power plant employees.[4] Under the Arizona Supreme Court's reasoning, many of these programs might have violated the Fourth Amendment.

C. The Arizona Supreme Court's insistence on evidence of substance abuse among Mesa's firefighters conflicts with this Court's and other courts' decisions and offends federalism principles.

Central to the Arizona Supreme Court's decision was its complaint that the City of Mesa had failed to put forth any evidence of drug or alcohol abuse by Mesa's firefighters. In the Court's view, "the City has failed to define a real and

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[4] *See also Piroglu* v. *Coleman*, 25 F.3d 1098 (D.C. Cir. 1994) (emergency medical technicians trainees); *Policeman's Benevolent Ass'n of New Jersey* v. *Washington*, 850 F.2d 133 (3d Cir. 1988) (police officers); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (certain prison guards); *Am. Fed'n of Gov't Employees* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (aircraft mechanics); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (*per curiam*) (civilian defense employees at army proving ground); *Rushton* v. *Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees); *Int'l Bhd. of Elec. Workers, Local 1245* v. *USNRC*, 966 F.2d 521 (9th Cir. 1992) (same); *Alverado* v. *Wash. Pub. Power Supply Sys.*, 759 P.2d 427 (Wash. 1988) (*en banc*) (prospective nuclear power plant employees).

substantial risk that random, suspicionless testing is designed to address." App 11a. This insistence on localized evidence of a problem conflicts with this Court's jurisprudence and other lower court decisions.

Earls, *Skinner* and *Von Raab* all make clear that actual evidence of abuse is not necessary to sustain a program of suspicionless testing. Two terms ago in *Earls*, the Court reaffirmed that it "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." 536 U.S. at 835. Likewise, in *Von Raab*, the Court upheld the suspicionless drug testing program for certain customs employees despite the absence of any documented abuse by those employees. 489 U.S. at 673; *id.* at 681 (Scalia, J., dissenting) (noting that "neither frequency of [drug] use nor connection to harm is demonstrated"). In *Skinner*, while the Government supplied some evidence of substance abuse by railroad employees, the Court's analysis of the Fourth Amendment issue did not turn on the existence of that evidence. 489 U.S. at 628-33; *see also Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 675-76 (1995) (O'Connor, J. dissenting) (individualized suspicion was impractical in *Von Raab* and *Skinner* because "even one undetected instance of wrongdoing could have injurious consequences for a great number of people"). To require that the City of Mesa come forth with specific evidence of drug and alcohol abuse, as the Arizona Supreme Court did, is to ignore this long line of decisions.

Chandler v. *Miller*, 520 U.S. 305 (1997), offers no refuge to the Arizona Supreme Court. In *Chandler*, this Court struck down a Georgia law requiring candidates for certain statewide political office to submit to drug testing and to certify that the results of their drug tests were negative. *Chandler* highlighted the lack of evidence of drug abuse among such individuals but carefully cabined its holding to cases where

"public safety is not genuinely in jeopardy." *Id.* at 323. Here, unlike in *Chandler*, substance abuse by the covered group (firefighters) places public safety in jeopardy.

The Arizona Supreme Court's demand for empirical evidence also conflicts with several lower court decisions that have not required evidence of abuse to sustain a program of suspicionless testing of firefighters and other employees in safety-sensitive positions. For example, the Ninth Circuit, typifying the views of numerous federal circuits, has declared that "nothing in Supreme Court precedent predicates the constitutionality of a drug testing program on the preexistence of a drug abuse problem in the group to be tested." *Int'l Bhd. of Teamsters* v. *Dep't of Transp.*, 932 F.2d 1292, 1305 (9th Cir. 1991).[5] None of the courts rejecting Fourth Amendment challenges to the suspicionless testing of firefighters has required evidence of substance abuse. *See City of Annapolis*, 565 A.2d at 681-82; *Hatley*, 164 F.3d at 603-04; *Penny*, 915 F.2d at 1066-67. *Cf. Wilcher* v. *City of Wilmington*, 139 F.3d 366, 378 (3d Cir. 1998). In *City of Annapolis*, the Maryland Court of Appeals emphatically rejected the need for empirical evidence of substance abuse: "Merely because there presently is no known illegal drug use among the covered employees does not compel its condemnation on Fourth Amendment grounds. A documented drug problem need not

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[5] *See also Knox County Educ. Ass'n* v. *Knox County Bd. of Educ.*, 158 F.3d 361, 379 (6th Cir. 1998); *Aubrey* v. *Sch. Bd. of Lafayette Parish*, 148 F.3d 559, 563 (5th Cir. 1998); *Dimeo* v. *Griffin*, 943 F.2d 679, 684 (7th Cir. 1991) (*en banc*) ("[G]overnment is not limited to addressing public safety problems after serious accidents reveal its want of foresight."); *Int'l Bhd. of Elec. Workers, Local 1245* v. *Skinner*, 913 F.2d 1454, 1461-62 (9th Cir. 1990); *Taylor*, 888 F.2d at 1194 ("[T]he government is not required to show that the group to be tested as a whole suffers from any incidence of drug abuse."); *Harmon* v. *Thornburgh*, 878 F.2d 484, 487 (D.C. Cir. 1989) ("Nor is it necessary that a documented drug problem exist [*sic*] within the particular workplace at issue.").

exist within the place of employment." 565 A.2d at 682. The Arizona Supreme Court, by contrast, virtually demanded such evidence as a condition for upholding Mesa's program.

The Arizona Supreme Court's insistence on evidence of substance abuse within the jurisdiction conducting the testing also offends federalism principles. The performance of safety-sensitive jobs in this country reflects a careful allocation of responsibilities between federal, state and local officials. For example, federal officials ordinarily have substantial responsibilities at areas such as the nation's borders or the nation's airports. *See United States* v. *Flores-Montano*, 124 S. Ct. 1582, 1585-86 (2004) (borders); Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001), *codified at* scattered sections of Title 49 of the U.S. Code (airports). By contrast, firefighting and police protection "'are typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services'" and "epitomize the concerns of local, democratic self-government." *Garcia* v. *San Antonio Metro, Transit Auth.*, 469 U.S. 528, 575 (1985) (Powell, J. dissenting) (quoting *Nat'l League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976)). Under the Arizona Supreme Court's logic, the threshold evidence necessary to sustain a program of random testing will depend partly on which jurisdiction has responsibility for the employees. For a federal responsibility, evidence of abuse by customs officers *anywhere* might support a nationwide program of random testing for those employees. By contrast, for a local responsibility, evidence of abuse in one locality would not support a program of random testing in another locality. This approach turns federalism on its head. It holds local governments to a higher standard of proof before they can implement random testing programs that might well pass constitutional muster if the same quantum of proof were provided for a federal program.

Requiring jurisdiction-specific evidence of drug and alcohol abuse as a prerequisite to random testing would be disastrous for local governments. Such a requirement does not allow localities to "prevent" substance abuse, as *Von Raab* permits, 489 U.S. at 674, and forces the public to "bear the risk" that undiscovered employees who suffer from substance abuse problems could put them in harm's way, *id.* at 671. Moreover, it may be difficult for jurisdictions to generate a statistically significant sample. Fire service in the country is generally handled locally. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook "Firefighting Occupations" 2 (2004-05 ed.) ("About 9 out of 10 firefighting workers were employed by municipal or county fire departments."). In many areas, fire departments may employ only a small number of individuals. *Id.* In such small departments, the incidence of abuse may not be widespread, yet the potential social costs of a substance abuser on duty are grave. The Arizona Supreme Court's decision supplies no guidance to local government on the quantum of proof necessary to justify a program of random testing. Are ten employees sufficient? If so, then fire departments in small towns may never be able to conduct random testing. Or must a statistically significant percentage of personnel be abusing substances before a city may act? If so, then fire departments in large cities may have to await rampant abuse before random testing can begin.

D. The Arizona Supreme Court's preference for a program based on individualized suspicion conflicts with this Court's settled principle that the Fourth Amendment does not require governments to employ the least intrusive means and ignores the greater risks of discrimination in such a program.

It bears emphasis that the policy challenged in this case, random testing, is but one piece of a larger strategy adopted

by the City of Mesa to deter and to detect substance abuse by its firefighters. That strategy also authorizes tests on the basis of reasonable suspicion, after an on-the-job accident, following a return to duty, or as a follow-up to "a determination that a covered member is in need of assistance." App 3a n. 2. The Arizona Supreme Court criticized the City of Mesa for failing to demonstrate why these remaining components of its strategy did not adequately serve the City's goals of deterring and detecting substance abuse. App. 8a n. 4. That reasoning conflicts directly with this Court's doctrine.

In the specific context of suspicionless drug tests, this Court repeatedly has made clear that the Fourth Amendment does *not* require governments to adopt the least restrictive means to address a societal problem. In *Earls*, the respondents employed the precise line of argumentation adopted by the Arizona Supreme Court and suggested that a drug testing program based on individualized suspicion would address the school district's concern about deterring and detecting drug use. This Court rejected that argument and cited a long line of decisions holding "that reasonableness under the Fourth Amendment does not require employing the least intrusive means." *Earls*, 536 U.S. at 837-38.

Earls explained how a testing program based on individualized suspicion actually might be inferior to a program of random testing. Individualized suspicion "might unfairly target members of unpopular groups" and "[t]he fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." *Id.* at 837 (citing *Acton*, 515 U.S. at 663-64). Here, the City of Mesa's system of computer-generated names, *see* App. 2a, avoids the pitfalls that this Court spelled out in *Earls* and *Acton*. The Arizona Supreme Court's decision ignores this important consideration.

II. The Constitutionality Of Testing Programs For Firefighters And Other Public Employees In Safety-Sensitive Positions Is A Matter Of National Importance Warranting This Court's Review.

Firefighters play a critical role in the provision of safety and first-responder services by municipal governments. As the Sixth Circuit has explained:

> Fighting fires is perhaps the most dangerous and hazardous of all professions. It is imperative that those who are charged with the public responsibility of extinguishing fires, sometimes risking their own lives for the sake of someone trapped, be free of the debilitating influences of controlled substances. It is well established that the use of such substances, such as marijuana, can adversely affect one's perception, decision-making time, short-term memory, motor skills, and judgment. Fire fighters so affected become a risk to themselves, their fellow fire fighters, and those depending on them for rescue.

Lovvorn, 846 F.2d at 1544; *see also City of Annapolis*, 565 A.2d at 681 (citing *Lovvorn* with approval). In the post-September 11 world, moreover, firefighters' duties extend far beyond the most familiar ones:

> The range of services provided by America's fire service continues to expand. In many areas, the local fire department is responsible for mitigating hazardous materials incidents, performing technical rescues, and providing emergency medical services. The threat of terrorist incidents further increases the fire department's responsibility, as firefighters must be taught to recognize the signs of a chemical or biological attack and the proper response.

U.S. Fire Admin., Fed. Emergency Mgmt. Agency, Trends and Hazards In Firefighter Training 2 (May 2003), *at* http://www.usfa.fema.gov/downloads/pdf/publications/tr-100.pdf.

While most firefighters discharge their duties honorably, substance abuse remains a substantial problem in the nation's firehouses. A recent study of New York City firefighters and emergency medical workers by Cornell University researchers estimates that 17% of firefighters are at risk for a moderate alcohol problem and 11% are at risk for a severe alcohol problem. Samuel B. Bacharach & Hilary Zelko, On the Front Line: The Work of First Responders in a Post 9/11 World, 26 (2004), *at* www.news.cornell.edu/releases/April04/FirefighterStress.pdf. In 2004, the number of New York City firefighters treated for drug and alcohol abuse jumped *fifty percent* in one year. Michelle O'Donnell, *Increase Seen in Treatment for Firefighters*, N.Y. Times, March 20, 2004, at B1. Numerous other examples from cities around the country demonstrate that substance abuse among the nation's firefighters is not an isolated problem. *See generally* Carol S. North *et al.*, *Coping, Functioning, and Adjustment of Rescue Workers after the Oklahoma City Bombing*, 15 J. Traumatic Stress 171 (2002) (noting that "alcohol misuse is a widespread problem in firefighters").[6]

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[6] *See, e.g.*, Angie Leventis, *Leaders saw signs of chief's drug use;* Morning News Trib., May 7, 2004, at B01 (City of DuPont, Washington fired its fire chief last year for abusing drugs); *Suspended S.F. Firefighters Test Positive for Banned Substances*, Contra Costa Times, Mar. 3, 2004, at 4 (San Francisco firefighters tested positive for marijuana and alcohol during surprise raid on firehouse); Briefs, South Bend Trib., Feb. 18, 2004, *available at* 2004 WL 71093225 (veteran Indiana firefighter dismissed after allegedly reporting to work while under the influence of marijuana); Cary Aspinwall, *Police Drug Testing Still Being Planned*, Tulsa World, Feb. 20, 2003, at A1 (Tulsa, Oklahoma firefighters tested positive for drugs); Matt Sabo, *Grand Jury Ties No Criminal Act to Firefighter's Death*, The Oregonian, July 30, 2003, at C01 (volunteer firefighter died after excessive consumption of bourbon); City of Madison Fire Department, Decisions of the Madison Bd. of Police and Fire Comm'rs, *at* www.ci.madison.wi.us/fire/PFCdecisions/PFCdecisions.htm (collecting disciplinary actions against Madison firefighters, including ones for substance abuse).

The consequences of such substance abuse are potentially grave. For example, this February, a firefighter, high on cocaine, crashed his fire truck into another while racing to a fire in New York City, causing a multi-car pile up and injuring thirteen people. Lisa Fleisher and Don Singleton, *Crash Firefighter Coked Up: FDNY*, N. Y. Daily News, Feb. 29, 2004, at 5. In Wyoming, a drunken firefighter drove a tanker truck into a colleague, crushing and killing him. Robert W. Black, *Accidents Put Alcohol Policies Under Scrutiny*, Cin. Post, Nov. 21, 2003, at A22.

To combat problems of this sort and to prevent potentially devastating accidents, local governments around the country have adopted random testing programs.[7] Other jurisdictions such as New York City are planning to implement such

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[7] In addition to Mesa's program, see *Anchorage Police Dep't Employees Ass'n*, 24 P.3d 547 (random drug testing for Anchorage firefighters); *Doe*, 816 P.2d 306 (random testing for Honolulu firefighters); *Wilcher*, 139 F.3d 366 (random drug testing for Wilmington firefighters); *Aguilera*, 768 N.E.2d 978 (random testing for East Chicago firefighters); *Woods* v. *Metro. Gov't of Nashville & Davidson County*, No. M2001-03143-COA-R3-CV, 2003 WL 22938947 (Tenn. Ct. App., Dec. 10, 2003) (random drug testing for firefighters in Metropolitan Nashville Fire Department); Gastonia, N.C., Substance Abuse Policies and Administrative Procedures § 4.5 & Att. B (2004) (random drug and alcohol testing for firefighters); Spanish Fork City, Utah, Controlled Substance and Alcohol Testing §1.50.070 (same); Ark. Mun. League, Sample Non-CDL Drug Testing Ordinance for Arkansas Cities and Towns §§ 3, 8(b) (Ark. Mun. League 2004) (random drug testing for employees in safety-sensitive positions); Fran Spielman, *No firefighter drug tests 1 year after they were ok'd*, Chi. Sun-Times, Mar. 26, 2004, at 20 (random drug testing of Chicago firefighters as part of collective bargaining agreement); Adam Klawonn, *Random Drug Tests by Mesa are Illegal*, Ariz. Republic, Jan. 28, 2004, at B1 (random drug testing for firefighters in five Arizona cities, including Phoenix); Rachel Webb, *Springdale Board Weighs Jailer Drug Tests*, Ark. Democrat-Gazette, Jan. 13, 2003, at 7 (random drug testing for firefighters in Springdale, Arkansas).

programs.[8] Such random testing has the potential to be extremely effective. One government study found that approximately twenty-eight percent of employees currently using illicit drugs would be less likely to work for an employer who tested randomly for drugs, a higher percentage than if the employer merely tested upon suspicion or following an accident. Substance Abuse and Mental Health Servs. Admin., U.S. Dep't of Health and Human Servs., Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National House-hold Survey on Drug Abuse" Table 5.4, *available at* http://www.oas.samhsa.gov/NHSDA/A-11/WrkplcPlcy2-3.htm#Tb54.

The decision below casts serious doubts over the constitutionality of such policies. Review by this Court will provide much-needed guidance over cities' important efforts to prevent the disasters caused by a firefighter working under the influence of drugs or alcohol.

III The Arizona Supreme Court's Decision Calls Into Doubt The Constitutionality of Federal Laws Requiring Municipalities And Other Entities To Employ Random Testing.

Congress has enacted detailed laws "[r]egarding drug use by persons in safety-sensitive positions," *Eastern Assoc. Coal Corp.* v. *United Mine Workers of Amer.*, 531 U.S. 57, 67 (2000), several of which require random testing. The Arizona Supreme Court's decision calls into doubt the constitutionality of these laws, including, among others, the Omnibus

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[8] *See* Patrick Healy, *Expressway Argument Leads to Arrest of Firefighter*, N.Y. Times, Apr. 12, 2004 at B-3 (New York Fire Commissioner announces plans to conduct random tests of 11,500 firefighters and 3,000 emergency workers).

Transportation Employee Testing Act of 1991 ("OTETA"), Pub. L. 102-143, 105 Stat. 952.[9] For this independent reason, the decision below warrants this Court's review.

Each year, state and local governments receive substantial transportation funds from the Federal Transit Administration. *See O'Brien* v. *MBTA*, 162 F.3d 40, 41-42 (1st Cir. 1998). As a condition of that assistance, the OTETA requires recipients and their contractors to conduct various forms of drug and alcohol testing, including random testing, of certain covered employees working in safety-sensitive positions. 49 U.S.C. § 5331(b) (authorizing regulations); 49 C.F.R. § 655.21, -.31 (requiring random drug and alcohol testing). Those covered employees include individuals who must carry firearms for security purposes and certain holders of commercial driver's licenses, which may include firefighters. 49 C.F.R. § 655.4; *O'Brien*, 162 F.3d at 42.[10] A recipient that fails to conduct this testing loses its eligibility for the federal funds. 49 U.S.C. § 5331(g).

The decision below throws into doubt the constitutionality of this scheme. Nothing in the OTETA or its implementing regulations limits the random testing program to jurisdictions that have a history of drug or alcohol abuse among its covered employees. Nor does the OTETA confine the use of random testing to situations where other forms of testing (pre-employment, post-accident, individualized suspicion) have

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[9] The decision below also calls into question other federal laws providing for random drug and alcohol testing. *See* 49 C.F.R. § 219.601, -.607 (certain employees in the railroad industry); 49 C.F.R. § 382.305 (certain holders of commercial drivers licenses); 49 C.F.R. § 199.105(c) (emergency employees at pipeline facilities); 14 C.F.R. Pt. 121 App. I, V.B (airline employees performing safety-sensitive functions).

[10] *See, e.g.*, Christopher Tritto, *Ambulance Board to Debate Drug Policy*, Charleston Gazette, Mar. 22, 2003, at 5C (noting that Charleston City Council requires holders of commercial driver's licenses, including firefighters, to be subject to random drug testing).

proven unsuccessful. As a consequence, the blanket requirement of random testing for safety sensitive employees under OTETA probably would not pass constitutional muster before the Arizona Supreme Court.

The decision below puts state and local governments in an intractable bind. In order to qualify for the federal funds, those governments must implement random testing programs. Yet, except for those jurisdictions with pre-existing substance abuse problems among its covered employees, any such program, under the Arizona Supreme Court's decision, probably would violate the Fourth Amendment. As a consequence, the decision below forces governments to choose between surrendering much-needed federal support and knowingly committing an alleged Fourth Amendment violation, thereby risking civil liability. *See* 42 U.S.C. § 1983. Only this Court can dispel the doubts over the constitutionality of the OTETA and provide the necessary guidance to local governments over the constitutionality of the federally mandated random testing programs.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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BRIEF OF THE CITY OF PHOENIX, THE CITY OF KINGMAN, THE CITY OF PEORIA, THE CITY OF PRESCOTT, THE CITY OF SOMERTON, THE CITY OF YUMA, AND THE LEAGUE OF ARIZONA CITIES AND TOWNS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the Arizona Supreme Court correctly held, in conflict with the principles of this Court and decisions of several lower courts, that the Fourth Amendment to the United States Constitution prohibits random, suspicionless drug testing of firefighters absent evidence of prior drug abuse within the fire department?

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The Cities of Phoenix, Kingman, Peoria, Prescott, Somerton, and Yuma, as political subdivisions of the state of Arizona, through their city attorneys, file this *amici curiae* brief in accordance with Rule 37.4 of the Court. The aforementioned cities as well as the League of Arizona Cities and Towns, upon written consent of both parties, also file this brief in accordance with Rule 37.2(a) of the Court.[1]

[1] A letter of consent to the filing of this brief, signed by both parties, accompanies this brief. Pursuant to this Court's Rule 37.6, the *amici* represent that no part of this brief was authored by counsel for either party, and that no person nor entity other than the *amici* made a monetary contribution towards the submission of this brief.

INTEREST OF THE *AMICI CURIAE*

The combined citizen population of the cities of Phoenix, Kingman, Peoria, Prescott, Somerton, and Yuma is 1,401,561, and the combined number of fire fighting employees is 1,749.[2] The municipalities represented all employ firefighters to serve and protect public safety and welfare. To hire and maintain an optimum firefighting force, each municipality utilizes some form of employee drug testing program, which may include a random drug testing component.[3]

The Arizona Supreme Court decision will have an enormous impact upon the drug testing procedures in all of the municipalities joining in this brief. The decision dramatically restricts municipalities' ability to ensure the fitness of firefighters in their central role as protectors of the public welfare. It places the public at great risk of harm in the name of shielding employees against minimally intrusive random drug tests. The decision, moreover, affects not only the drug testing of firefighters, but also the random testing of all municipal employees.

The cities submit this brief to illustrate the impact of the Arizona Supreme Court decision on municipal employers and firefighters, and to argue that certiorari review is needed to correct the erroneous interpretation of the United States Fourth Amendment as applied to municipalities and firefighters, to clarify the standard necessary to justify randomly testing firefighters, and to prevent that standard from being

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[2] The League of Arizona Cities and Towns represents the interests of eighty-eight cities and towns in Arizona.

[3] The following cities joining this brief ceased random drug testing of firefighters because of the Arizona Supreme Court's decision: Kingman, Phoenix, Somerton, and Yuma. All cities joining in this brief currently use random drug testing for some of their employees (police, commercial drivers, security guards, etc.) and have expressed interest in using random drug tests on firefighters.

applied more broadly to any municipal occupation subject to random drug testing.

SUMMARY OF ARGUMENT

The Arizona Supreme Court decision provides a vague standard of what evidence is necessary to justify random drug testing of firefighters under the Fourth Amendment of the United States. Despite clear direction by this Court to the contrary, the Arizona Supreme Court has declared evidence of prior drug use a mandatory element that must exist in each individual municipality before random drug testing may stand. At the same time, the decision provides little guidance as to the threshold level of evidence needed to justify the implementation and maintenance of random tests.

The Arizona Supreme Court's Fourth Amendment interpretation is not limited to the testing of firefighters. Under *its* new special needs balancing scheme, any municipal employee in any occupation could successfully challenge random drug testing where there is no evidence of prior drug abuse in his or her field. Moreover, the broad application of this new standard will prevent employers from carrying out the federally mandated random drug testing of commercial drivers' license holders in the absence of evidence of drug abuse.

To ensure firefighters' fitness for duty, municipalities nationwide have instituted drug testing procedures at various stages in the employment process. In Arizona, random drug testing of firefighters has proven effective in the detection and deterrence of drug use. Random drug testing is not only constitutional, but in this occupation is a necessary means to protect our citizens and to maintain confidence in firefighter integrity.

ARGUMENT

The Arizona Supreme Court decision runs afoul of the special needs balancing test adopted and repeatedly clarified by this Court. The Arizona Supreme Court attempted to apply

this Court's test to determine the reasonableness of the City of Mesa's (Mesa) random drug testing of its firefighters and incorrectly held "that the Program's random component falls outside the 'closely guarded category of constitutionally permissible suspicionless searches.'" (Petitioner's Appendix (Pet. App.) 16a-17a, quoting *Chandler v. Miller*, 520 U.S. 305 (1997))

I. THE FOURTH AMENDMENT'S SPECIAL NEEDS BALANCING TEST, AS MUTATED BY THE ARIZONA SUPREME COURT, REQUIRES A QUANTUM OF EVIDENCE OF PRIOR DRUG ABUSE AND CREATES A VAGUE STANDARD THAT IS IMPOSSIBLE TO IMPLEMENT

As this Court noted, "[w]hen such 'special needs' . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 at 309. A proper context-specific inquiry in this case would include an analysis of Mesa's public interest in the safety of its citizens and of the private interests of firefighters as government employees. By focusing on evidence of prior drug use, however, and declaring that "[t]he absence of evidence of drug use . . . provides no basis for us to conclude that random, suspicionless testing is calibrated to respond to any defined risk," (Pet. App. 8a) the Arizona Supreme Court has transformed the inquiry from context-specific to content driven.

This Court has repeatedly stated that evidence of prior drug use is hardly a necessary element in the balancing test, although it may shore up justification for testing. *Id.* at 319. While the Arizona Supreme Court acknowledged this Court's direction, (Pet. App. 8a-9a), it nonetheless chose to raise the existence of prior drug use from a possible factor to a mandatory prerequisite in the special needs balancing test, concluding that "the City's generalized and unsubstantiated

interest . . . is insufficient to overcome even the lessened privacy interests of the firefighters in this case." (Pet. App. 16a) In so holding, the Arizona Supreme Court has run into precisely the danger that this Court envisioned.

This Court has addressed the impossibility of "articulat[ing] a threshold level of drug use that would suffice to justify a drug testing program" and has "refuse[d] to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'" *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 836 (2002).

By making content evidence of drug abuse necessary, the Arizona Supreme Court has forced the articulation of a threshold level of prior drug abuse. Yet as this Court predicted, having demanded evidence of drug abuse, the Arizona Supreme Court was then unable to clearly articulate what quantum of drug use would suffice.

A. The Arizona Supreme Court Decision Makes It Impossible to Know What Evidence Is Necessary to Justify Random Drug Testing

The Arizona Supreme Court bemoans the absence of "evidence of even a single instance of drug use among the firefighters" nor "even an allegation or rumor that the City's firefighters used or abused drugs or alcohol." (Pet. App. 8a) Does this therefore suggest that a single instance of drug use, or the mere allegation or rumor of a single instance of drug use would satisfy the threshold level of evidence necessary to justify random drug testing?

Beginning in 1999, Phoenix instituted random drug testing in direct response to the drug related suicides of several firefighters. These deaths occurred despite the existence of other, non-random drug testing procedures such as reasonable suspicion testing. The Arizona Supreme Court's decision provides little guidance as to whether this would be sufficient

evidence of drug use within the Phoenix Fire Department to justify adding a random drug testing program.

In finding Mesa's special needs interest "unsubstantiated," the Arizona Supreme Court also points to the lack of evidence to "suggest that firefighters asked for or consented to the testing policy." (Pet. App. 8a) The genesis of Phoenix's random drug testing program was via an agreement between the United Phoenix Firefighters Association, Local 493 and the Phoenix Fire Department. The opinion below suggests this would be evidence supporting a special need, but does not reveal whether this would be constitutionally sufficient evidence.

B. The Arizona Supreme Court Is as Unclear in Stating Who May Use Evidence of Prior Drug Use as It Is in Stating What Evidence Is Sufficient

In requiring a quantum of "accidents, fatalities, injuries, or property damage that can be attributed to drug or alcohol use *by the City's firefighters*," (emphasis added) (Pet. App. 8a), the court below indicates that each individual city must present a history specific to its individual employees. Under the Arizona Supreme Court's analysis, therefore, if even one drug related death substantiated the need for random testing in Phoenix, neighboring Mesa would nonetheless be precluded from using that same incident to justify its program.

As inconceivable as it seems, the Arizona Supreme Court would demand Mesa wait until it too had a drug related suicide (or other drug related tragedy) before it could institute the same random drug testing program as Phoenix.[4] Similar

[4] In fact, Mesa's random drug testing policy for firefighters was taken from Phoenix, when a Phoenix Assistant Fire Chief transferred to Mesa. This partially explains Mesa's inability to cite its own history of drug use as justification for its policy.

reasoning was rejected by this Court in the context of airport passenger screening, stating "we would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 (1989).

Moreover, using a "city" as the proper boundary within which drug use must exist before random testing is permitted is an arbitrary selection. If drug use is occurring in only one of six fire stations in a given city, perhaps random drug testing would only be justified in that station and not the entire city. The ensuing difficulty, therefore, caused by the fact specific, content driven inquiry of the Arizona Supreme Court's version of the special needs balancing test, is in defining the relevant employment sphere: state by state, city by city, district by district, station by station. In *Earls*, this Court stated "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program" and instead found it sufficient to note the existence of a student drug problem nationwide. *Earls*, 536 U.S. at 836.

C. While the Arizona Supreme Court Provides Little Clarity of What Evidence Justifies Random Testing, It Provides No Explanation of What Evidence Justifies the Continuation of Random Drug Testing

This Court has noted "When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. at 675. Unfortunately, the Arizona Supreme Court's analysis comes to an opposite conclusion: greater drug abuse presents a stronger argument for random testing and lesser (or no) drug abuse

presents a weaker, and indeed fatal, argument for random drug testing.

If, as the Arizona Supreme Court has stated, evidence of drug use is now a central factor in the special needs balancing test of the Fourth Amendment, even municipalities that had shown a threshold level of drug problems could be at risk of losing their right to randomly test should drug use in the target occupation cease.

The Phoenix Fire Department's random drug testing program is relatively new. From the program's start in 1999 through 2003, positive test results from random drug testing have fallen 70%. Can the argument be made that Phoenix now lacks a quantum of drug use within its firefighting force necessary to sustain the constitutional validity of continuing random testing? Is there some period of time where, if positive tests cease altogether, justification for random testing also ceases?[5] Ironically, under the Arizona Supreme Court's misaligned balancing test, the efficacy of random drug tests in deterring drug use among Phoenix firefighters could become its own undoing.

II. THE ARIZONA SUPREME COURT'S FLAWED FOURTH AMENDMENT INTERPRETATION IS IMPOSSIBLE TO RECONCILE WITH DECISIONS NATIONWIDE AND FEDERAL REGULATIONS THAT PERMIT RANDOM DRUG TESTING OF OTHER, EQUALLY OR LESS SAFETY SENSITIVE OCCUPATIONS

The Arizona Supreme Court's Fourth Amendment interpretation is not limited to the random testing of firefighters: using its analysis, all government, municipal, and public

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[5] This scenario is entirely possible. Consider the Phoenix Police Department. Phoenix instituted the random drug testing of its police force in 1991. In the last five years, Phoenix police officers were subjected to 6,977 random drug tests, producing no positive tests.

random drug testing programs are at risk where there is no evidence of prior drug use within the targeted occupation.

A. If the Arizona Supreme Court's Misaligned Balancing Test Precludes the Random Testing of Firefighters, Then It also Precludes the Random Testing of Law Enforcement Occupations That Possess Equivalent Safety Sensitive Traits

If being positioned to cause even a single incident of grave public harm, carrying firearms, investigating crimes, handling drugs, or needing to be mentally and physically fit are what makes an occupation safety sensitive enough to provide government with compelling interests sufficient to overcome the privacy interests of its employees, then firefighters, who share all of these traits at least some of the time, must also be sufficiently safety sensitive to permit random drug testing.

Law enforcement responsibility is a common factor shared by customs agents, correctional guards, and police officers; all occupations that the courts have held sufficiently safety sensitive to establish a special need to drug test.[6] Firefighters likewise take on some law enforcement duties in the performance of their jobs. As the first responders to overdose calls, firefighters are charged with searching for drugs and bringing them to hospitals to identify what an individual attempting suicide may have ingested.[7] Firefighters are also charged

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[6] *See, e.g., Von Raab*, 489 U.S. 656 (1989) (customs agents); *Hansen v. California Dept. of Corrections*, 920 F.Supp. 1480 (N.D. Cal. 1996) (correctional guards); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989) (police); *Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988) (police); *National Treasury Employees Union, et al. v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (police).

[7] In a one year period ending April 30, 2004, Phoenix firefighters responded to 3,316 calls regarding reported overdoses.

with assisting in confiscating illegal drugs involved in the commission of crimes and turning them over to the police. Some firefighters, moreover, are more law enforcement officers than fighters of fire: Phoenix arson investigators are firearms carrying, sworn officers, who spend the majority of their time investigating fire related crimes.

Unlike other employees whose job functions occur mostly in an office setting, and whose decisions and actions are insulated from the public, officers' job functions occur primarily in direct contact with the public. In this respect, officers and firefighters are equally matched. As with other highly sensitive positions, firefighters so directly serve public safety that a drug impaired member poses an immediate threat to the lives of the citizenry, such "that a single slip-up . . . may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs." *Harmon v. Thornburgh*, 878 F.2d. 484, 491 (D.C. Cir. 1989).

In an emergency, there is neither time nor opportunity to second guess a firefighter's or officer's choices and abilities; we instead trust that he arrives on scene with complete mental and physical fortitude to see the situation through to its best possible conclusion. To give us this trust in their abilities, employees in both occupations should "expect intrusive inquiries into their physical fitness for those special positions." *Von Raab*, 489 U.S. at 672.

In *Von Raab*, this Court recognized that government has a compelling interest not only in ensuring the physical fitness of customs agents, but also in ensuring their "unimpeachable integrity and judgment." *Id.* at 670. Customs employees "may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service." *Id.* at 669.

Like customs workers, firefighters' special position and expertise makes them vulnerable to bribes, blackmail, and other malfeasance. Today's firefighters have intimate knowledge of drugs, regularly using this expertise during the course of their duties to identify harmful drug use and administer helpful drug treatment. Firefighters also have ready access to a laundry list of drugs, stored at the fire station for use by firefighters and other emergency medical personnel.[8] If firefighters, because of their own drug use, are "unsympathetic to their mission" of safeguarding the public, then the municipalities face the risk of irreparable harm to their citizenry.[9] *Id.* at 670.

Given that firefighters share many of the traits that make customs agents, corrections officers, and police officers safety sensitive enough to provide government with a compelling interest in drug testing, it is clear that if the Arizona Supreme Court's decision is permitted to stand, all government employers in Arizona now face the loss of the right to randomly test these other occupations absent evidence of drug problems in their individual arenas.

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[8] Drugs accessible at a Phoenix fire station include: Adenosine, Albuterol, Aspirin, Atropine Sulfate, Bretyliam Tosulate, Calcium Chloride, Dextrose, Diazepam, Diphenhydramine HCL, Dopamine HCL, Epinephrine, Furosemide, Glucagon, Lidocaine IV, Methylprednisolone, Morphine Sulfate, Nalozone, Neosynephrine, Nitrostat Tablets, Oxytocin, Sodium Bicarbonate, Thiamine HCL, Verapamil.

[9] An example of the cloud that can envelope a drug abusing firefighter, drawing into question his integrity and judgment comes from recent newspaper accounts of arson for hire at the hands of several area firefighters, two of whom tested positive during random drug tests. Regardless of the outcome of any criminal charges, the integrity of those firefighters and public confidence in their cities' fire departments has been damaged by the drug connection.

B. The Broad Brush of the Arizona Supreme Court's Interpretation Leads to Inevitable Conflict With Nationwide Court Decisions Approving of Random Drug Testing in Occupations That Are Far Less Safety Sensitive Than Firefighting

Horse racing personnel, school custodians, and airport air cooling and heating maintenance mechanics have all been considered by courts to be sufficiently safety-sensitive to merit random testing.[10] This is because the courts properly weighed the invasiveness of drug testing against the interests of public safety, using the presence or absence of prior drug abuse as merely a factor to place on either side of the scale. Using the Arizona Supreme Court's balancing test, however, these less safety-sensitive occupations would surely fail to justify random testing in the absence of an occupational drug history.

School custodians in Arizona would not face the same random tests permitted of custodians in Louisiana. The Fifth Circuit in *Aubrey* approved random drug testing, declaring that, even without evidence of a custodial drug abuse problem, school custodians were "considered safety sensitive because of the handling of potentially dangerous machinery and hazardous substances in an environment including a large number of children ranging in age from three to eleven." *Aubrey*, 148 F.3d at 564.

Firefighters engage in all of those custodial activities and more. Firefighters aren't simply present near children, but lay hands on them in the performance of a rescue or

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[10] *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir.1991) (horse racing jockeys); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986) (horse racing jockeys and personnel); *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (school custodians); *Boesche v. Raleigh-Durham Airport Authority*, 432 S.E.2d 137 (App. 1993) (air cooling and heating maintenance mechanics).

emergency medical service. Beyond ensuring clean school environments, we entrust firefighters to ensure safe home environments for children, going so far as to permit firefighters to forcibly enter homes without consent. The hazardous substances custodians work with in the school setting are multiplied in the duties of firefighters, who respond to hazardous material spills, secure possible anthrax mail, or investigate suspicious and potentially lethal odors. Finally, the dangerous machinery custodians control are surely more benign compared to the multi-ton ladder trucks, fire engines, and rescue vehicles driven at break-neck speeds, with legal authority to disobey traffic laws, through city streets. If the school board of Lafayette Parish needed no evidence of custodial drug use, but was permitted random drug testing largely on the safety-sensitive nature of a school custodian's duties, then one is left to wonder why the clearly more safety sensitive occupation of firefighter merits a requirement of evidence of prior firefighter drug use.

C. The Arizona Supreme Court Decision Conflicts With Federal Regulations Mandating Random Drug Testing in Areas Such as Commercial Driving Occupations

In Arizona, municipalities use random drug tests on their commercial vehicle drivers. Random tests are utilized, not because of any evidence of drug use in given municipalities, but because random drug testing of commercial driver's license (CDL) holders is federally mandated.[11] CDL holders are subject to random drug testing because of the potential for great damage at the hands of drug impaired drivers of large commercial vehicles. Noteworthy is the lack of any federal

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[11] The Omnibus Transportation Employee Testing Act mandated regulations for drug testing transportation employees. 49 U.S.C. § 5331. Following this mandate, the Federal Motor Carrier Safety Administration dictated the random drug testing of all commercial driver's license (CDL) holders in each state or municipality. 49 C.F.R. 383.3 (2003).

regulation requiring evidence of drug history as a prerequisite to enforcing the federal directives.

Arizona's employers are now caught between obeying the Arizona Supreme Court's interpretation of the Fourth Amendment and following federally mandated random drug testing requirements for CDL holders. A City of Peoria bus driver could attack that city's random drug testing of mass transportation employees, citing the lack of evidence of drug use within the City of Peoria's bus driving population. Under the Arizona Supreme Court's Fourth Amendment special needs balancing test, the lack of evidence would certainly tip the scales against the right to test those employees.[12]

III. CONTRARY TO THE ARIZONA SUPREME COURT'S FINDING, RANDOM TESTING IS LESS INVASIVE AND MORE EFFECTIVE THAN OTHER FORMS OF TESTING IN DETECTING AND DETERRING DRUG ABUSE AMONG FIREFIGHTERS CHARGED WITH THE PROTECTION OF THE PUBLIC

Across the nation, the role of firefighters has expanded exponentially. Firefighters are paramedics and rescue workers, trained to thrive under pressure, permitted to invade our homes, and trusted to administer life saving care. They respond to calls involving criminal acts, often taking on law enforcement responsibilities. Firefighters are also part of this nation's line of defense against terrorism, as evidenced by their central role in responding to 9/11, the World Trade Center bombing, and the bombing of the Oklahoma Federal

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[12] If the random drug testing of CDL holders was found to be protected by the Fourth Amendment, the Arizona Supreme Court's decision would produce an even more nonsensical result: without needing a history of drug abuse, the City of Yuma can test drivers of 21,300 lb. street sweepers, but cannot test drivers of 60,360 lb. ladder trucks or 39,800 lb. fire engines.

Building. Once existing solely to combat fires, a firefighter now part fighter of fire, doctor, officer, and soldier.[13]

Entwined with the expanding role of firefighter is expanding connection to drugs. As this Court noted, "dr abuse is one of the most serious problems confronting c society today. There is little reason to believe that Americ workplaces are immune from this pervasive social problem *Von Raab*, 489 U.S. at 674. In firefighting, the line betwe outside society and inside workplace is obliterated: a fi fighter's job takes him into America's homes and a fi fighter's home (the fire station) is also his workplace.

Both living at a fire station and while on call in t community, firefighters have constant exposure and access drugs of all kind. They face the relentless temptation taking drugs as an easy way to deal with the highly taxi physical and mental demands of firefighting: steroids to ke in shape, stimulants to deal with long hours and non-standa work schedules (such as multiple day, extended hour shi battling forest fires), depressants to take the edge o adrenaline highs from firefighting, and alcohol to dull t stress of life saving responsibilities in life endangeri circumstances.

As firefighters shoulder ever increasing responsibility the public, so their municipal employers bear ever increasi responsibility to ensure firefighters' fitness for duty. In t face of firefighters' constant exposure to drugs, it natural follows that employers have instituted measures to constant test for drug abuse.

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[13] In fact, firefighters spend far more time on emergency medi service (EMS) calls than on fire calls. In Phoenix, eighty percent of ca for service are for EMS, with the remaining twenty percent split betwe calls for fire and everything else, from hazardous chemical spills rescuing cats in trees.

A. Random Testing Is Hardly as Dangerously and Substantially Invasive as the Arizona Supreme Court Believes

Although the Arizona Supreme Court found that "[Mesa] has designed its Program to reduce its intrusion upon the firefighters' privacy interests," (Pet. App. 12a-13a), it nonetheless found the very nature of random tests, in "preclud[ing] any advance notification" to be highly intrusive, creating inherent "fear and surprise." (Pet. App. 15a) This Court has recognized, however, that with the proper safeguards, the randomness of a drug test causes little more fear and surprise than the prospect of taking a scheduled drug test. *See, e.g.*, *Earls*, 536 U.S. at 822.

Courts have found that the "randomness" of a test merely adds "some weight to the 'invasion of privacy' side of the Fourth Amendment balance," *Bluestein v. Skinner*, 908 F.2d 451, 456-6 (9th Cir. 1990), and is simply "a relevant consideration [that] in a particularly close case . . . would tip the scales." *Harmon*, 878 F.2d at 489. What negligible fear and surprise a random test might cause a normal employee, moreover, could hardly be a concern to firefighters who face far greater terror and uncertain fate every time the siren, randomly and without notice, rings and they board an engine to race into unknown calamity and peril.

The Arizona Supreme Court's great concern, that random testing subjects firefighters to "continuous government scrutiny," and "raises the specter of the 'unsettling show of authority,'" is also overblown. (Pet. App. 15a-16a) A firefighting applicant faces the future with the expectation that there will be testing for pre-employment qualification, during probation, upon accident or incident, and upon reasonable suspicion. Faced with the routine plethora of tests, one additional type of drug test should add no more or less expectation, nor should it add any additional burden to the normal duties of a firefighter. As a condition of their

employment, firefighters consent to this regimen of testing. Having consented, it cannot be seriously maintained that such tests violate the Fourth Amendment.

While this Court has repeatedly held that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 (1989), the Arizona Supreme Court still counted against Mesa its inability to show "that these [non-random] testing alternatives fail to deter and detect drug use among the City's firefighters." (Pet. App. 8a)

B. Random Drug Testing of Firefighters Has Proven More Effective in Detecting and Deterring Drug Abuse Than Other Forms of Testing

Like Mesa, Phoenix employs drug testing of firefighters as a prerequisite to employment, during the probationary first year, upon work-related accidents, upon reasonable suspicion, and on a random basis. All of these tests are reactive, triggered after the occurrence of an event. If the non-random components of drug testing adequately detect and deter drug abuse, then random drug testing should prove redundant, finding no additional positive tests. Phoenix's multi-prong drug testing approach, however, reveals that there are still drug abusers escaping detection, finally caught during yearly random drug tests.[14]

The efficacy of a random drug testing program is proven not only by detecting drug use through positive test results, but also by the self-reported admission of drug use and/or

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[14] Despite the multiple other forms of drug testing utilized, random drug testing in the Phoenix Fire Department has detected additional positive results every year since the implementation of random drug tests in 1999.

resignation of firefighters immediately prior to the administration of random tests.[15]

It is the very nature of random tests that makes them such powerful deterrents. Random tests, "the timing of which no employee can predict with certainty," will "significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct . . . concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty." *Skinner*, 489 U.S. at 630. If random testing ceases, drug using firefighters no longer face the certainty of discovery and instead face the much smaller risk of falling under reasonable suspicion. The incentive to self-identify or resign before being caught greatly diminishes.

Without proactive, random drug tests, employers are limited to reactive drug tests. Inherent in any reactive process is the danger that the best indication of drug use may be the worst possible circumstance: the revelation of drug use after the occurrence of a catastrophic event.[16]

While testing based upon individualized, reasonable suspicion, in theory, appears to be somewhat proactive, it does not, in practice, sufficiently safeguard the public. The efficacy of reasonable suspicion testing depends upon the ability of observers to detect the signs and symptoms of drug abuse. As courts have noted, however, it is easy to miss signs of abuse as a drug impaired individual "will seldom display any outward signs detectable by the lay person or, in many cases,

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[15] In conjunction with the random drug testing program, Phoenix provides a form of amnesty for individuals who "self-identify" their drug problem. Many cities also allow firefighters to resign rather than face the revelation of drug use through testing.

[16] Confirmation that a firefighter's drug abuse contributed to the slow and painful burning death of a child is small consolation to the surviving parents.

even the physician." (citation omitted) *Skinner*, 489 U.S. at 628, quoting 50 Fed.Reg. 31526 (1985).

While working and living next to one another makes fellow firefighters better situated than most to observe drug use, that same communal environment makes the reporting of observed drug use far less likely. There is a brotherhood among firefighters that creates strong bonds of trust and loyalty. As admirable as those traits are, they can have serious repercussions in the context of failure to report drug abuse.

Firefighters are fiercely independent, historically choosing to handle matters like drug abuse internally. An expectation that firefighters must "turn in" their fellow members upon individualized suspicion of drug abuse creates an adversarial process at odds with the familial relationship within a fire station. This Court has noted a similar conflict within the educational setting between a teacher's roles as "educator, adviser, friend, and parent-substitute" and a teacher's obligation "of spotting and bringing to account [student] drug use." *Vernonia School District 47 J v. Acton*, 515 U.S. 646, 664 (1995).

In a perfect world, upon seeing the signs of drug abuse, fellow firefighters would report possible drug abuse. Reasonable suspicion testing would ensue. In practice, however, individualized, reasonable suspicion testing is fraught with complications. In the end, reasonable suspicion testing fails because it relies on one firefighter to suspect the worst in another. Accusatory by nature and individually stigmatizing, reasonable suspicion testing is so vulnerable to human error and human bias that it cannot be more practicable than random drug testing, which completely eliminates the need for human accusation and treats all firefighters equally. In these respects, "testing based on 'suspicion' of drug use would not be better, but worse." *Id.* at 664.

Without random drug testing, a firefighter could escape detection until a drug induced error finally creates reasonable suspicion. This approach is unacceptable, however, where even a single drug induced error could cause catastrophic damage. Courts have recognized that drug impaired employees can cause such harm in a single train wreck,[17] airplane crash,[18] failed customs drug interdiction,[19] and are so uniquely positioned to "cause great human loss before any signs of impairment become noticeable to supervisors," *Skinner*, 489 U.S. at 628, that the safety sensitive nature of their jobs supports a compelling interest in drug testing. The harm that can be caused by a firefighter's botched response to a fire, drowning, accident, medical emergency, hazardous material spill, or bombing is equal to, if not more safety sensitive than these harms and is certainly "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 628.

If the job functions of customs agents, train operators, officers, and airline employees, are so safety sensitive, and if the risk of harm to the public by the failures of those employees is so immediate and significant, as to overcome the minimal invasion of those employees' privacy interests occasioned by drug testing, then surely the position of firefighter is no less safety sensitive, and the risk of harm is no less great as to merit their random drug testing.

CONCLUSION

As argued by the Petitioner, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted and the Arizona Supreme Court decision should be reversed.

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[17] *Skinner*, 489 U.S. 602.

[18] *Bluestein*, 908 F.2d 451.

[19] *Von Raab*, 489 U.S. 656.

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